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THE IMPACT OF THE CIRCUIT EXECUTIVE ACT

By John T. McDermott and Steven Flanders

Federal Judicial Center
April, 1979

This publication is a product of a study undertaken in furtherance of the Center's statutory mission to conduct and stimulate research on matters of judicial administration. The analyses, conclusions, and points of view are those of the authors. This work has been subjected to staff review within the Center, and publication signifies that the Center regards it as responsible and valuable. It should be noted, however that on matters of policy, the Center speaks only through its Board.

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Proponents of the Circuit Executive Act hoped that the new position would lead to comprehensive improvement in federal court management. In addition to helping the circuit chief judge with existing administrative tasks, the circuit executives were expected to fundamentally improve management and operation of the court of appeals (and also the district courts). They were expected also to extend the scope and improve the operation of the judicial councils.

However, there was little specific discussion of precise tasks. No professional staff was provided, and the courts themselves did little to define the scope of the job. Most executives were left to develop their positions ad hoc.

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Although there was obvious potential for conflict, little was done to define in advance the jobs of circuit executive and circuit clerk. The relationship has been unsatisfactory in several instances. Of three ways the positions have been defined and distinguished, the most satisfactory has been a role for the circuit executive as staff to court and council. This leaves full responsibility to the clerk to manage his office, but provides an important episodic role to the circuit executive when problems or new issues arise.

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Some circuit executives have instituted major improvements in the judicial process, but the record has been spotty. Some courts have limited the executives' role in "judicial business," and some executives have not taken vigorous or effective initiatives in improving the judicial process. Often the executives' time was preempted by work as administrative assistant. The scope and importance of the circuit executives' successes indicate they can accomplish a great deal.

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Only a few circuit executives have had a major impact in district courts. Most have been limited by competing priorities, by their identification with the court of appeals and council, and other factors. The instances of circuit executive success in district court matters indicate a large potential role here.

VI. STAFF TO THE JUDICIAL COUNCIL AND JUDICIAL CONFERENCE 188

Circuit executives have been useful and effective in staffing the Councils and Conferences. They have not brought a dramatic expansion of council activity, as some proponents of the Act hoped (probably this was unrealistic).

Staff work to Councils and Conferences could still bear improvement. The councils should delegate authority to make decisions on minor administrative matters. The circuit executive should present data to the council in a more manageable form.

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Some concluding observations about a changing role:

- The skills of a knowledgeable insider in the courts have proved important, as have legal skills. High-level managerial experience has been less important.

- Circuit executives have had to focus excessively on minutiae thus far, partly in order to establish a "track record."

- Now that the position is well established, circuit executives should be able to grow further into the more potent aspects of the job, helping to improve the judicial process in all courts in their circuits and strengthening the judicial councils. Also, it is to be hoped that they can have a larger and more direct role in the work of the Judicial Conference of the United States and the Federal Judicial Center.

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FOREWORD

The Circuit Executive Act, signed by the President in 1971, was an important part of a general movement in the 1960s and 1970s to improve court management and justice administration--federal, state, and local. In the early 1960s, for example, there were about twenty state court administrative offices; today, there are fifty, not to mention those in the District of Columbia and Puerto Rico.

A number of factors account for this effort to improve the administration of the courts. United States Supreme Court decisions on the rights of criminal defendants, along with the growth of crime as a public policy issue, prompted scrutiny of how the courts actually operate, and a search for ways to improve their operations. Thus, the 1967 Report of the President's Commission on Law Enforcement and Criminal Justice noted that although thirty state court administrative offices were then in existence, "the functions of this office are limited, and its potential has not been realized." It was necessary, the Commission said, to bring into these offices people "with training and

primary interest in management. . . . Court administration is a developing field in which a clear understanding of techniques is evolving. There is a need for more experimentation and increased use of promising methods for ordering the business of the courts."

Other factors also played a role. In January, 1975, Professor Leonard Sayles took note of the increased interest in "the organizational problems inherent in such socially profound fields as justice," and observed that it was "not clear whether the justice system has only recently come into focus as an important field of inquiry because management is now recognized as a crucial element in the delivery of public services, or because the courts themselves and leading jurists now voice concern over organization issues almost comparable to that voiced over legal issues." Indeed, the creation of such agencies as the Federal Judicial Center in 1967, the Institute for Court Management in 1970, and the National Center for State Courts in 1971, reflect the general interest in improved judicial administration that added to the impetus for passage of the Circuit Executive Act.

Given this active, if somewhat undefined ferment, it is understandable that legislatures would recognize

that administrators can make a valuable contribution to the courts without knowing exactly what that contribution would be. The Congress, at the turn of the decade, knew from the suggestions of Chief Justice Warren and Chief Justice Burger, as well as others in the federal judiciary, that additional administrative support was necessary if the circuit councils were to meet the 1939 Congressional expectation that they be vital elements of federal judicial administration. Precisely what the circuit executives' contribution would be was less clear, and it is to the credit of the Congress that it was willing to authorize their appointment, convinced that the potential good they could do justified the Act even though it was impossible to predict the full range of contributions they might make.

The circuits' experiences under the Act bear out Congress's reluctance to set rigid specifications for the duties of the office. As this report shows, the circuit executive roles in the various circuits could hardly be fit into a single mold. Different circuits provided different opportunities for circuit executives. Yet it should occasion no surprise that variations in the executives' contributions are due in some

measure to variations in the skills of the executives and in the willingness of judges and others to derive the maximum from the skills they offered.

Our hope is that this report can help the office of circuit executive realize its potential--varied as it may be throughout the system--by reviewing as systematically as possible the strong and weak point of the courts' experiences under the Circuit Executive Act.

* * *

This report was undertaken at the request of the Board of the Federal Judicial Center, in light of assurances given by the Chief Justice that he would report to Congress on the operation of the Circuit Executive Act. The Judicial Center conducted a field survey beginning in December 1976 that included conferences in every circuit as well as study of relevant reports, correspondence, and other documents. (The method and scope of the survey are described in detail in appendix A; appendix B summarizes a previous, preliminary survey.) This report is one of two that have been published growing out of our survey of circuit executive activities. An earlier report, Operation of

the Federal Judicial Councils, was prepared at the request of the Subcommittee on Jurisdiction of the Court Administration Committee of the Judicial Conference of the United States; this request was made after work on the circuit executive report was already underway. The judicial council report appraised the regional governing bodies of the federal judiciary, which appoint the circuit executives and which are serviced by them.

Because this study of the impact of the Circuit Executives Act is, of necessity, more qualitative than most of our research, it rests more heavily on the authors' individual judgments than do most Center reports. For that reason, readers may have special interest in the authors' backgrounds. Professor McDermott has been a member of the faculty of Loyola of Los Angeles School of Law since 1975, following several years on the faculty of the University of Montana. Previously he held a series of positions in court administration under the late Chief Judge Alfred P. Murrah of the Tenth Circuit, who directed the Federal Judicial Center from 1970 to 1974. These included the positions of Chief Deputy Clerk and later Chief Staff Attorney for the Judicial Panel on Multidistrict Liti-

gation. Steven Flanders has been on the Judicial Center staff since 1972, following three years on the political science faculty of the University of Vermont. In addition to directing this project, Dr. Flanders has also served as Project Director of the Center's District Court Studies Project. In that capcity and others he has published numerous studies of federal court operations.

As is the case with all Judicial Center research, we have received splendid cooperation from the judges and others in the federal judicial community, and I am pleased to have this opportunity to express our gratitude. Appendix A lists the many judges and others who provided their ideas and experience in meetings held during the project. The chief judges of the circuits were especially helpful, as were the circuit executives, who were unfailing in their cooperation. Many circuit chief judges and circuit executives contributed their views after reading drafts of this report, and this final version reflects their invaluable suggestions.

A. Leo Levin
Director

CHAPTER I

THE NEED FOR A CIRCUIT EXECUTIVE

The Circuit Executive Act[1] introduced a new type of manager in the federal judiciary. The Act inspired enthusiastic hopes in its supporters both before passage and during its early implementation. This report, based on a field survey in each circuit, examines the Act's impact in the light of hopes and expectations expressed for it. We try to take into account also the actual possibilities before the circuit executives in their first six years or so, as well as some observations drawn from other writing on court executives and professional managers generally.

As early as February 1968, the Judicial Conference of the United States recognized the need for some kind of administrative assistance to the chief judge.[2] It recommended that an administrative assistant to the chief judge of each circuit be provided. However, the

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1. 28 U.S.C. § 332(e)(f) (1976); Act of Jan. 5, 1971, Publ. L. No. 91-647, 84 Stat. 1907.

2. Annual Report of the Proceedings of the Judicial Conference of the United States, (February, 1968), at 31 [hereafter Judicial Conference Report].

impetus for establishing the more comprehensive position of circuit executive seems to have come largely from Chief Justice Warren E. Burger, the late Chief Justice Earl Warren, and the American Bar Association.

On August 12, 1969 Chief Justice Burger spoke at the traditional breakfast sponsored by the Institute of Judicial Administration during the American Bar Association meeting in Dallas, Texas. The Chief Justice expressed deep concern over the slow pace of judicial proceedings in the United States. He suggested that American justice takes so long partially because of "the lack of trained managers."[3] He asked, "[I]s it not a paradox that, except in details, a civil or criminal trial today, for example, is essentially the same as in Daniel Webster's time?"[4] He concluded that "we must take some emergency steps to meet what may be called problems of deferred maintenance and moderniza-

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3. Burger, "Court Administrators: Where Would We Find Them?" Remarks of Chief Justice Warren E. Burger at the Institute of Judicial Administration Breakfast, American Bar Association Convention, Dallas, Texas, August 12, 1969, reprinted in Hearings on S.952 Before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong. 1st Sess. 357 (November 5, 1969) [hereafter "November Hearings"].

4. Id. at 358.

tion of our courts' machinery. . . . the primary available option is to secure skilled managers to run the administrative machinery so that judges can get on with what they are presumed to be qualified to do--namely, trying and disposing of cases."[5]

The Chief Justice began by emphasizing that "We must literally create a corps of court administrators or court managers and we must do so at once."[6] Largely as a result of his concern, the Institute for Court Management was established soon after. It has provided training to nearly all the individuals who have been appointed to circuit executive positions.

There were precursors to Chief Justice Burger's interest in federal court executives. In a May, 1968 speech before the American Law Institute, the late Chief Justice Earl Warren carried the Judicial Conference proposal a step further.

> The Judicial Conference of the United States at its last meeting recognized the need for an assistant to the chief judge of each circuit to help him in performing the administrative responsibilities of his court. Such an assistant

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5. Id. at 358.

6. Id. at 357.

> would undoubtedly be helpful. But the need for administrative assistance goes far beyond the needs of the chief judge of the courts of appeals to the need of the circuit councils with their complex managerial tasks. The councils must have the eyes, ears and expertise of management which the expanding workloads of the circuits demand.[7]

Accordingly, the Judicial Conference subsequently approved "in principle" legislation to create a court executive serving the judicial council.[8] The more comprehensive position in the revised proposal, and endorsed by both chief justices, was generally consistent with earlier proposals of the American Bar Association and the Administrative Office of the United States Courts.[9]

Legislation

On June 23, 1969, the Senate took the first step toward what became the Circuit Executive Act by passing S.952, an Omnibus Judgeship Bill that also included two

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7. This speech is reprinted in Hearings Before the Subcommittee on Improvements in Judicial Machinery, Senate Comm. on the Judiciary, 90th Cong., 2d Sess. 292-299 (July 25, 1968) [hereafter "Senate Hearings"].

8. Judicial Conference Report at 7 (March 1969).

9. See appendix C.

provisions for federal court administrators.[10] One provision authorized the appointment of a court executive for each judicial council. The other provided, subject to the approval of the judicial council of the circuit and the Judicial Conference of the United States, a district court executive for each district with six or more permanent judgeships.[11]

However, the House Judiciary Committee recommended that the court executive provisions be excluded from the bill. According to the committee this was not because it was "unsympathetic or insensitive to the proposition that the Federal courts need or could profit from improved management techniques for dealing with growing caseloads and administrative complexities," but because the committee felt that this measure should not be tacked on to a bill providing for additional judgeships.[12]

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10. [1970] U.S. Code Cong. & Ad. News 3223.

11. The bill also contained provisions authorizing judicial councils to issue subpoenas and permitting the utilization of electronic court reporting. They were subsequently eliminated from the bill.

12. [1970] U.S. Code Cong. & Ad. News 3226.

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Following passage of the 1970 Omnibus Judgeship Bill, Senators Joseph D. Tydings and Roman L. Hruska, and Congressmen Emanuel Celler and William M. McCulloch introduced legislation to authorize court executives. Their initial proposals differed from the bill eventually enacted by Congress in three important respects. The final bill provided only for the appointment of court executives for the eleven judicial councils, eliminating provisions for district court executives.[13] Also, the final bill required that all circuit executives be selected from a list of administrators certified by an independent board composed of the Director of the Federal Judicial Center, the Director of the Administrative Office of the United States Courts and three members elected by the Judicial Conference of the United States. This procedure replaced the initial plan that required circuit executives to be selected

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13. In rejecting a provision that would have authorized court executives for the district courts with six or more judges the House suggested that some experience with circuit executives would be helpful in assessing the need for district court executives.

from a list of qualified candidates established by the Administrative Office.[14]

In addition, the final bill resolved a conflict between those who urged that a detailed list of mandatory duties be included and those who preferred to leave the circuit executives' duties entirely to the discretion of the judicial councils. Although not mandating any specific responsibilities the bill included the following list of duties that could appropriately be delegated by the councils:

1. Exercising administrative control of all nonjudicial activities of the court of appeals of the circuit in which he is appointed.

2. Administering the personnel system of the court of appeals of the circuit.

3. Administering the budget of the court of appeals of the circuit.

4. Maintaining a modern accounting system.

5. Establishing and maintaining property control records and undertaking a space management program.

6. Conducting studies relating to the business and administration of the courts within the circuit and preparing appropriate recommendations and reports to the

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14. The initial proposal ran into strenuous opposition from a number of federal judges. The Administrative Office later repudiated the suggestion, and disclaimed responsibility for it.

chief judge, the circuit council, and the Judicial Conference.

7. Collecting, compiling, and analyzing statistical data with a view to the preparation of reports based on such data as may be directed by the chief judge, and circuit council, and the Administraive Office of the United States Court.

8. Representing the circuit as its liaison to the courts of the various States in which the circuit is located, the marshal's office, State and local bar associations, civic groups, news media, and other private and public groups having a reasonable interest in the administration of the circuit.

9. Arranging and attending meetings of the judges of the circuit and of the circuit council, including preparing the agenda and serving as secretary in all such meetings.

10. Preparing an annual report to the circuit and to the Administrative Office of the United States Courts for the preceding calendar year, including recommendations for more expeditious disposition of the business of the court.[15]

The bill had many proponents and little opposition. The Chief Justice of the United States, the President of the American Bar Association, and the Judicial Conference of the United States embraced the bill in principle. The bill was also strongly endorsed

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15. 28 U.S.C. § 332(e)(1-10).

by the new director of the Administrative Office, the late Rowland F. Kirks, and his immediate predecessor, Ernest C. Friesen.[16] Finally, several circuits and their chief judges strongly endorsed the establishment of the office of the circuit executive. The Ninth Circuit Judicial Conference was an exception, expressing a preference for administrative assistants to the chief judges.[17]

The only fundamental opposition came from the Federal Court Clerks' Association. Its president, Richard Peck, then clerk of the District of Nebraska and now United States Magistrate for the District of Nebraska, believed that the bill was hastily conceived and would create an unnecessary administrative layer. Mr. Peck testified that the Federal Court Clerks' Association "questioned . . . the wisdom of precipitously imposing between judge and clerk . . . an additional executive

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16. Mr. Friesen resigned as Director of the Administrative Office to become the first director of the Institute for Court Management, which has provided training to nearly all of the present circuit executives.

17. Hearings before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 2d Sess. 47-53 (July 8, 1970) [hereafter "July Hearings"].

layer intended for improvement of administration but without clear definition of relation to existing organizational structure or actual benefits to be derived." Instead the Association "recommended investigation of a proposal to rename the clerk's office to court executive office; retitle the clerk as director; make delegation of broader and more specific administrative powers . . . and to increase compensation to the level indicated in S.952."[18]

Administrative Assistance--And More

Wide benefits were expected from the creation of the new position. At a minimum, virtually all proponents viewed the circuit executive as an administrative officer who would relieve the chief judge of much of his administrative burden. For example, Senator Tydings suggested among other functions that the circuit executive would "relieve the chief judge of the circuit of numerous administrative chores and burdens, leaving the chief judge to supervise the court executive and conserving his time for the exercise of the paramount judicial function, that is, judging and de-

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18. November Hearings at 317-318.

ciding cases."[19] Newell W. Ellison chairman of a Committee on the Administration of Justice in the District of Columbia, testified before the House Committee on the Judiciary that "more and more of our best judges are forced to devote increased time and attention to administrative matters in an effort to solve the management problems of the court system--necessarily neglecting to some extent their principal responsibility of disposing of cases that come before them."[20] He concluded that "the nonjudicial responsibilities of running a court . . . should be left to those better equipped to handle them."[21] Rowland F. Kirks envisioned that the court executive would "be primarily responsible for relieving the chief judges of the circuits of the onerous burdens of administration which have fallen upon them and increased each year." He noted that "[t]he tasks of administering these evergrowing circuits with their evergrowing caseloads have

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19. November Hearings at 350.

20. Id. at 427. Mr. Ellison's committee, appointed by the Judicial Council of the District of Columbia Circuit, had conducted a study of all of the courts of the District of Columbia.

21. Id.

required that the chief judges devote less and less time to the business of adjudicating and disposing of cases and more and more time on the tasks of administration."[22]

The notion that relieving the chief judge of his burdens would be a primary responsibility of the circuit executive was echoed by Congressman Wylie Mayne from Iowa,[23] and Associate Deputy Attorney General John W. Dean III.[24] Mr. Dean referred to a report in which Mr. Will Shafroth, former Deputy Director of the Administrative Office of the United States Courts, found

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22. July Hearings at 6.

23. Id. at 41.

24. Id. at 43-44. Mr. Dean suggested "that [a] circuit executive could free the chief judge of the court of appeals from the day-to-day chores of managing the court's business by performing such duties as setting up and maintaining adequate accounting and budgeting systems, formulating and administering personnel policies, and maintaining property control."

We know of no evidence that any of the chief judges of the courts of appeals were significantly involved in any such administrative duties. Indeed, as Mr. Peck emphasized in his testimony, these duties probably should be performed by the clerk, not by the chief judge (to the degree they exist at all as administrative responsibilites of individual federal courts). Mr. Peck observed that any judge performing that sort of duty "is undoubtedly so constituted in tempermanent that he is not likely to relinquish those prerogatives to anyone else, no matter what the title of the official." November Hearings at 318.

that the chief judges of courts of appeals were spending from one-third to one-half of their time on administrative duties.[25] Even the Ninth Circuit Judicial Conference, in opposing the establishment of the office of circuit executive in 1970, recognized the need for providing administrative help to the Chief Judge. It adopted a resolution that proposed that the Judicial Conference "seek authority from the Congress of the United States for the chief judge of each circuit and the chief judge of each district having six or more judges to employ an administrative assistant . . . with appropriate supporting personnel to assist the chief judge in the performance of his administrative duties.[26]

However, a recurring theme in the statements of many proponents of the Act is that the administrative assistant function would be the minimal one; the more important tasks of the circuit executive lay elsewhere. These tasks, moreover, would require individuals with skills and status entirely new to the judiciary. We

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25. July Hearings at 42.

26. Id. at 47.

have noted that both chief justices considered the 1968 request for administrative assistants too narrow. Chief Justice Warren anticipated creating an "executive office" that would be an "urgently needed management headquarters" in each circuit; it would also disseminate and apply the work of the newly-created Federal Judicial Center.[27] Chief Justice Burger felt there were very few individuals in the system qualified to discharge the comprehensive responsibilities he had in mind.[28]

Judge Carl McGowan of the D.C. Circuit emphasized the importance of high status and pay. "A court like mine needs someone like the managing partner of a law firm to administer its work. This should be a lawyer who is paid a salary as high as any of the judges . . ."[29] "This job must be something considerably more than a law clerk for administration."[30] Senator Joseph

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27. Senate Hearings at 297-298.

28. November Hearings at 357.

29. Senate Hearings at 274.

30. Id. at 276.

D. Tydings quoted these views with approval.[31] The statute as finally enacted permits a salary equal to Executive Level V, not as much as the judges' pay but higher than any other court supporting staff. This level in the executive branch is reserved to top level administrators, such as assistant secretaries of large agencies and comparable officials.

Clearly the circuit executive was intended to break new ground. Just what this ground would be, and how the executive would make the anticipated dramatic contribution is not entirely clear in the legislative history or other elements we can find in the sources of the Act.

Staff to the Judicial Councils

Proponents of the new office expected that the circuit executives would assist the judicial councils in discharging their statutory responsibilities. It was Senator Tydings' view that since their creation in 1939, the judicial councils had not adequately carried out their responsibilities.[32] Testimony before the

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31. Id. at 300.

32. November Hearings at 350. The judicial councils, whose powers and composition are defined in 28 U.S.C.

Subcommittee on Improvements in Judicial Machinery, which he chaired, led him to conclude "that the councils had been relatively important [sic; prob. "impotent"] in meeting their responsibilities under section 332 because they were unable to develop the necessary facts on which orders for improved administration of the courts could be fashioned." Senator Tydings concluded that a circuit executive could bring "managerial expertise and experience to the councils" and, by so doing, could give "vitality to the administrative prerogatives now granted to, but not now effectively exercised by the respective judicial councils."[33]

Joseph L. Ebersole, the present deputy director of the Federal Judicial Center, agreed with Senator Tydings. In a report on ways to implement the Circuit Executive Act, prepared shortly after its enactment, he noted that "under Chief Justice Hughes' original proposal each circuit council was to be staffed by an ad-

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§ 332, are the regional governing bodies of the federal judiciary. See our companion report from this project, Operation of the Federal Judicial Councils (Federal Judicial Center 1978).

33. November Hearings at 350.

ministrative officer and have direct control of its budget as well as to be charged with gathering statistical information."[34] Anticipating that the "addition of administrative support to the [judicial] councils will strengthen them as the management linchpins of a decentralized judiciary,"[35] Mr. Ebersole suggested that "[t]he most significant question which emerges from the Circuit Executive Act is the extent to which it will have an impact on the role of the circuit councils." Pointing out that "the Circuit Executive Act is an amendment to 28 U.S.C. § 332 and as such represents a vitalization of this section," he concluded that the circuit executive was to "act as the arm of the circuit council."[36]

However, a broad interpretation of section 332(e), making the circuit executive responsible for improving the administration of all courts within the circuit, seems to be in conflict with the purpose of the bill

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34. J. Ebersole, Implementing the Circuit Executive Act, 6 (October 18, 1971) (unpublished paper in the Federal Judicial Center library).

35. Id. at 2.

36. Id. at 4.

the Senate originally proposed. S.952 provided for both district court executives and circuit court executives and seemed to suggest that each would act independently: the circuit executives responsible for management of the court of appeals and the district court executives responsible for the management of the largest district courts. Indeed, a close reading of section 332(e) indicates that the major "management" responsibilities suggested for the circuit executive relate only to the court of appeals. Only subdivisions six, nine and ten refer to "the courts within the circuit," and those relate only to studies, meetings and reports.[37] The circuit executive's statutory relationship with the district courts is largely derivative, stemming from the judicial council's responsibility under section 332(d).

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37. There was opposition to the possible involvement of the circuit executive in the affairs of the district courts, even in the degree contemplated in S.952, the early bill that included a provision for district court executives. The late Honorable William H. Hastie, then chief judge of the Third Circuit, testified that he doubted the "wisdom of a Judicial Council undertaking to vest in a staff officer, however competent, as extensive supervision and authority over the daily operation of the district courts within the circuit as this proposal seems to contemplate." In his judgement, "[r]esponsibility for and authority over the detailed

Circuit Manager

There were those who saw the circuit executive as more than administrative assistant to the chief judge and staff officer to the judicial councils. Referring to the Judicial Conference's approval of an administrative assistant for the chief judge, Mr. Friesen said "[w]hile this post would be desirable, it does not go far enough to provide the kind of administration which is needed on a daily basis within the circuit. In concept, it does not provide a trained manager with individual responsibilities for the whole circuit."[38] Mr. Friesen noted that the Chief Justice envisioned that the circuit executives would take the initiative in finding ways to improve court efficiency and reduce backlogs, and make litigation less expensive and less time consuming.

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day to day administration of the multi-judge district courts should remain primarily in the Chief Judge of the district and his fellow district judges." Hearings Before the Subcommittee on Improvements in Judicial Machinery, Senate Comm. on the Judiciary, 91st Cong., 1st Sess. 364 (April, 1969). Chief Judge Hastie's views provoked a lively colloquy with Senator Tydings at 373-377.

38. Senate Hearings at 290.

In recognizing the need for an innovative circuit executive Senator Tydings stated:

> Despite hundreds of years of criticism, our courts are administered in essentially the same way they were two centuries ago. Congestion, waste and delay, unfortunately, too often characterize many of our Federal and State Courts and too often in the past the only solution judges, executives, and legislators have offered to redress these evils are more judges or more supporting personnel.
>
> This manpower, though often necessary, offers little hope for making our courts truly modern instruments of our justice.
>
> Courts will not have modern and efficient administration until they begin to tap the knowledge of management consultants and systems analysts. To date, such experts have largely been ignored in the development of ideas for improving the administration of our courts. In order to make our courts function effectively and to avoid administrative chaos, any court system of substantial size needs, as an integral part of its administrative machinery, a court administrator or executive subject to the general supervision of the judge responsible for administration.
>
> The court executive should be skilled in modern management techniques and the social sciences and capable of utilizing such knowledge and modern business machines, including computers, to study and improve the administration of the court system. His job would be not only to plan more effective use of court space and supporting personnel, but also to streamline management of the court's calendars and dockets and supervise the flow of cases through the system. He would not make judicial decisions. He would be responsible for seeing that cases

are moved to a point where the judges' art can be employed to hear and decide the matter.[39]

Other Models for the Circuit Executive

Most of the testimony in support of the Circuit Executive Act made no clear connection between the ills perceived in federal courts and the remedy: a court executive. There were some attempts to deal with specific duties, however. Appendix C contains summaries of several of these. As noted there, most suffer for our purposes from a focus on the duties to be performed in state courts, where the court executive handles the budgetary, financial, and other responsibilities handled here by the Administrative Office. Also, much of the legislative history of the Act deals with the early versions that included provisions for district court executives. Of primary interest here is the emphasis in many statements on the directive role of the new court executive, with respect not only to support personnel, but also judges.[40]

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39. Statement by Senator Joseph D. Tydings on the floor of the Senate on September 29, 1969, reprinted in November Hearings at 353.

40. See comments of Theodore Voorhees, appendix C at 270.

Perhaps the most precise and detailed statement of specific responsibilities a federal circuit executive could undertake appears in a letter to Professor Paul D. Carrington from Judge Carl McGowan of the United States Court of Appeals for the District of Columbia Circuit.[41] Judge McGowan identified nine specific areas in which the circuit executive could relieve judges of burdensome administrative tasks:

1. Circuit Judicial Conference. Judge McGowan suggested that the circuit executive could be responsible for planning the annual judicial conference of the circuit and for handling the arrangements for it. He could serve as permanent secretary for the conference, continuously following up the decisions taken at the previous year's conference and planning for the next conference. Judge McGowan observed that this type of assistance would not only release judicial time but also enhance the important contributions the annual conference could make to the administration of justice in the circuit.

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41. The letter, dated December 15, 1966, is reprinted in Senate Hearings at 276-278.

2. Criminal Justice Act. Judge McGowan indicated that he had spent substantial time reviewing the operation of the Criminal Justice plan for the District of Columbia but that he had "a desperate need . . . of finding out exactly what is being done under the Act, both in our court (the court of appeals) and in the other courts of the District of Columbia covered by it." In his view, a circuit executive could provide "effective liaison with other courts in order to assure some degree of equity in the making of appointments." Turning to the problem of applications for fees under the Criminal Justice Act, Judge McGowan noted that the presiding judge of the panel hearing the appeal is frequently the person designated to hear requests for fees. Judge McGowan observed that "with the right kind of an administrator, all of these problems could largely be put in his charge; and the results would undoubtedly be infinitely better than they are now."

3. Liaison with Public Agencies. Judge McGowan noted that either the chief judge or the chief judge's delegate is a member of the executive committee for the D.C. Bail Agency (created by Congress) and the Legal Aid Agency that provided public defense in criminal

cases. He observed that the circuit executive could be responsible for "the oversight obligations" presently assigned to those judges.

4. Liaison with the Administrative Office. Judge McGowan stressed the need for "more effective liaison on a continuing basis with the Administrative Office of the United States Courts." He pointed out that "[a] lot needs to be done on the rationalization of statistics which are presently the main preoccupation of the Administrative Office, but beyond that there are many areas where improvements could be had, including preparing for the presentation of the judicial budget to the Congress."

5. Court Personnel. Judge McGowan referred to the time expended by judges in advertising for, screening and interviewing applicants for court law clerks or staff attorneys. He concluded: "There is no reason why [this job] could not be done by a court administrator."

6. Case Management. Judge McGowan suggested that the circuit executive could also play the role of "watchdog" over the disposition of cases heard and taken under advisement by the court of appeals. At the

present time this task is performed by two circuit judges and involves a great deal of their time. Again, he concluded: "A high grade administrator could take over this task."

Judge McGowan was also concerned with the necessity for an "expert and informed examination of the cases as they are filed [in the court of appeals]." He anticipated that the court of appeals will have to develop "some kind of machinery for summary disposition" of cases for abbreviated consideration. He recognized that this function requires "intelligence, legal ability and judgment of a kind which cannot be expected to exist under the present salary level in the Clerk's offices" and that it is essential to "have confidence in the person performing this function." He concluded that such a task could be performed by the circuit executive.

Judge McGowan also recognized the need for a constant reexamination of the court's rules and procedures, and recognized that this tends to be neglected by the members of the court. "It is something," he concluded, "which must be done by a truly expert observer."

7. Facilities. Judge McGowan noted that there are "inevitably a number of matters which arise involving the physical arrangements of the courthouse which require attention and decision." He felt that any time judges presently spend on this is too much.

Although Judge McGowan's list was not intended to be exhaustive, he concluded that it was "enough to suggest there is a very large amount of very important work around a court . . . which calls for a talent of the highest order." His list contains a number of the more important specific responsibilities which realistically can and should be performed by a circuit executive. To us they serve as examples of "the possible," and therefore can serve as a partial measure of the performance and accomplishments of the circuit executives.

Perspectives

As might be expected, each of the supporters of the Circuit Executive Act had a somewhat different notion of the office and its expected benefits. The circuit chief judges saw the circuit executive as an administrative assistant who would handle many undefined administrative tasks, presumably minor and routine

ones. Senator Tydings hoped that the judicial councils, now assisted by the circuit executive, would begin to assume the responsibilities entrusted to them thirty years before. Chief Justice Burger saw the circuit executive as an innovative manager of the court of appeals (and possibly of district courts as well) who would apply sophisticated management skills to the problems of the courts. The chairman of the ABA Section on Judicial Administration saw the circuit executive as an offical who would plan and--in a purely administrative sense--direct the judges' work.[42]

The Act, then, left the job of defining the new position to the courts and to the circuit executives themselves. Even though it was not precisely defined, the new position clearly combined some disparate elements. Congress was convinced that circuit chief judges needed administrative help on matters of daily routine. Congress apparently believed also that there was a large agenda of dramatic policy initiatives that a professional manager with new skills could introduce. The questions the Act left open represent our agenda in

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42. See comments of Theodore Voorhees, appendix C.

examining the circuit executives' work on each of their major functions.

1. Administrative Assistant. There was and is a widely-held belief that chief judges are too involved in administrative matters and that someone else--besides the judge's secretary and law clerks, and the clerk of the court of appeals--should handle many of them.[43] However, except for the mistaken impression of one witness[44] there was little precise discussion of what the circuit executive could do, or more important, what the chief judge would be willing to delegate to him. (Only Judge McGowan offered specific suggestions, relating primarily to his court alone.) Nor was consideration given to the possible need to change Administrative Office policies or statutes that involved chief judges in administrative matters.

2. Staff to the Judicial Council. The assumption seems to have been that an important, threshold impedi-

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43. Perhaps it should be pointed out that in many large state trial courts being chief judge or presiding judge is a full-time job in its administrative aspects only; even when the court has the service of a qualified court executive the chief judge may do no case-related work.

44. See note 24 supra.

ment to more effective or aggressive council action was the lack of staff support. But most councils used the clerk of the court of appeals as staff (secretary) to the council, and had other assistance available if needed (for example, the staff law clerks). The real problem, if there is a problem, may lie elsewhere.[45]

3. Court Management. There are several ambiguities here. First, the legislative history does not make it clear whether or in what sense the circuit executive is the manager of all the courts within the circuit or only the court of appeals. Second, it does not clarify the relationship between the court executives and the clerk (or clerks, if the district courts are included), who has traditionally been responsible, on behalf of the court, for management of its operations and its non-judicial personnel. Third, "management" was considered by some to deal with business matters (budget, personnel, space, etc.) but by others to include case management, scheduling, and the whole litigative process generally. Finally, a larger scope for management at the circuit level would seem to necessi-

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45. See our report, note 32 supra.

tate some decentralization of the authority vested in the Administrative Office; neither the Circuit Executive Act nor any implementing legislation or policy has effectuated such decentralization.[46]

Thus the actual legislation gives the circuit executive no new authority, no mandatory duties and no staff,[47] yet its advocates expected significant changes

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46. For example, the circuit executives have much less leverage on budgetary matters than most state court administrators. In his testimony, Mr. Kirks emphasized that "the judiciary operates under a uniform congressionally approved personnel system . . . administered by the Director of the Administrative Office." He opposed giving the circuit executive the authority "to set up a separate system." With respect to budget matters, Mr. Kirks challenged the notion that each circuit could submit a circuit budget directly to the Bureau of the Budget, pointing out such a procedure "would repeal 28 U.S.C. § 605 which requires the Director of the Administrative Office to submit a consolidated budget for the Judiciary." July Hearings at 8-9.

47. Although the general consensus was that the circuit executive would be able to perform these many and varied tasks "singlehandedly," Mr. Ebersole concluded that "[i]t is a patent absurdity to assume that the addition of only one person--the circuit executive--will result in the expected improvements in the administration of the courts of each circuit." He envisioned a staff of four to seven persons including "(1) a budget specialist, (2) a statistician, (3) a personnel and training specialist, and (4) one or more management analysts or systems analysts." Implementing the Circuit Executive Act, supra note 35 at 24.

to result in each circuit. It is therefore not surprising that the role of each circuit executive developed in a manner reflecting the specific personalities and problems of his circuit.

CHAPTER II

ADMINISTRATIVE ASSISTANT TO THE CHIEF JUDGE

This chapter focuses on the circuit executive's role as an administrative assistant to the chief judge of the court of appeals. There will be some overlap with other sections of the report, but here we will emphasize the circuit executive's function as a staff assistant to the chief judge on matters with minimal policy content, rather than as a manager of the court of appeals or as staff to the judicial council. For want of a better word, we refer to the subject of this chapter as "administrative" duties. These include operational personnel matters not resolved elsewhere, budgets, space and facilities, arrangements for visiting judges, Criminal Justice Act vouchers, relations with outside organizations and the public, assisting the chief judge with speeches and correspondence, and other matters.[48]

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48. We do not intend to suggest a dogmatic distinction between policy and administration. Administration is often at the heart of policy. See, for example, L. Sayles, Managerial Behavior (1964) (especially chapter I), or H. Solomon, The Rise of the Court Executive, 60 Judicature 114 (especially the quotation of Jacques

The chief judge of each court of appeals has numerous administrative responsibilities that are not shared by other appellate judges. Prior to the appointment of circuit executives, a number of chief judges found ways to delegate some of the more onerous and less important administrative duties, especially to their secretaries, some of whom functioned essentially as administrative assistants. Others assigned these duties to their personal law clerks or one of the staff law clerks. In many circuits also, the clerk of the court of appeals handled a wide range of administrative matters for the chief judge.

Even where some help was available, many chief judges were concerned about the amount of time they spent on administrative matters. Thus, much of the support for establishing the position of circuit executive came from chief judges of courts of appeals, who expected that the circuit executive would relieve them of many administrative duties and responsibilities. Chief Judge David L. Bazelon of the United States Court of Appeals for the D.C. Circuit emphasized

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Barzun at 118). However, many circuit executive tasks, the subject of this chapter, are relatively remote from policy.

that "[t]he administrative work in most of the circuits has become so onerous that judicial duties must be sacrificed if the court is to operate efficiently. The circuit executive would relieve the judges of administrative chores for which they are not particularly equipped and free them to do their work as judges."[49] Strong support for the creation of an administrative assistant position for chief judges of both district and appellate courts is found in the resolution of the Judicial Conference of the Ninth Circuit, July 23, 1970. It disapproved of the legislation establishing the position of circuit executive, and proposed instead that each chief judge of a circuit and the chief judge of every district having six or more judges be authorized "to employ an administrative assistant to serve at the pleasure of the chief judge . . . to assist the chief judge in the performance of his administrative duties . . . ."[50]

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49. See July Hearings at 47-53 for this and other statements emphasizing need for administrative assistance.

50. Id. at 47. The seventh circuit chief judge also refused to support legislation creating the position of circuit executive because he was convinced that the need was for an administrative assistant to the chief

Although the Ninth Circuit resolution was not embraced by Congress there is substantial legislative history to indicate that providing administrative assistance to the chief judge was to be a primary duty of the circuit executive. As shown in Chapter I, Judge McGowan, Mr. Kirks, and several others testified that administrative burdens on chief judges were a major concern.

Survey Findings

One of the principal functions of every circuit executive has been to serve as administrative assistant to the chief judge. Many indicated that they were spending a great deal of their time on this function, some as much as 75 percent. However, there was little evidence that the presence of the circuit executive had achieved the goal of significantly reducing the administrative burdens on the chief judge. Only in the Second Circuit did this result seem certain from our

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judge rather than a circuit executive. After the legislation had been adopted the Seventh Circuit initially declined to fill the position. Eventually selected as circuit executive was the person who had been serving as administrative assistant to the chief judge for several years.

discussions with circuit judges and the chief judge himself.[51]

One circuit presents a good example of the problem. According to one circuit judge the chief judge has assigned virtually "all delegable" administrative responsibilities to the circuit executive. In spite of this, the court has recently reduced the chief judge's case load, as he was not able to keep up with his opinions and also handle his administrative responsibilities. The reasons the circuit executives, as a group, have not markedly reduced the administrative burdens of the chief judge appear to be: (1) a steady increase in the overall administrative responsibilities of the chief judge, and (2) the reluctance of most chief judges to delegate administrative responsibilities (except to a judge). This reluctance stems from tradition, the sensitivity of certain administrative matters, the perceived inability of a few circuit executives to effectively discharge the more sensitive and difficult duties, and statutes or Administrative

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51. One commented that the chief judge would be "buried" by administrative matters if it were not for the assistance provided by the circuit executive. Another indicated that the circuit executive allowed each judge, and especially the chief judge, to spend more time being a judge.

Office practice that seem to require certain matters to be handled by the chief judge himself.

We received suggestions that the circuit executives need more statutory authority, and greater recognition by the Administrative Office. Specifically, it was suggested that the circuit executive should be authorized to handle all administrative problems relating to the clerks' offices (both of the court of appeals and the district courts) and that he should handle such things as Criminal Justice Act vouchers, increases in salaries for part-time bankruptcy judges and magistrates, and other non-judicial functions including most matters of resource allocation (especially those that now require judicial council action).

Although some statutory modifications might be useful and appropriate, the main problem seems to be the inability of some chief judges to fully delegate administrative responsibilities to their circuit executives. The legislative history of the Act clearly anticipated a new degree or style of delegation. The Act established the circuit executive at the salary of the assistant attorney general for administration, and

the assistant secretaries for administration of other cabinet agencies. If he is to act as a "managing partner," then delegation must not take place within the old constraints more suitable to work with a law clerk or administrative assistant. Authority to make administrative decisions should be delegated, not just the responsibility to gather information in support of those decisions.

In one circuit the chief judge estimated that he still spends between forty and sixty percent of his time on administration. This is so because he is unwilling or unable to delegate many matters to the circuit executive. Some appear too sensitive to be handled by anyone other than the chief judge or a delegated judge--these may include most problems involving individual judges, including contacts with district judges on purely administrative matters. Others involve issues the circuit executive was thought not qualified to handle because he lacked requisite legal training and experience (Criminal Justice Act vouchers, for example).

In another circuit, the circuit executive recently moved from the "seat of the court" to the city in which

the chief judge resides, feeling that closer proximity would permit him to be of greater assistance to the chief judge. The chief judge and his personal staff had been handling routine administrative matters, and it did not seem to us likely that the move would have the desired effect. However, we have been advised that the new arrangement is proving satisfactory.

In another circuit the circuit executive and several circuit judges commented that the chief judge handled more administrative matters than he should. According to one judge, for example, the great hope of the council in appointing a circuit executive was to relieve the chief judge of much of his administrative burden. This was not realized because of the chief judge's passion for detail and sense of personal responsibility and involvement in each matter of administrative detail. This has made it difficult for him to delegate effective administrative responsibility.

Even in circuits where the chief judge has a reputation for being an exceptional administrator, there was substantial concern that he had not delegated sufficient <u>important</u> administrative tasks to the circuit executive. In one such circuit, the circuit executive

seems to have taken over administrative responsibilities previously handled by the chief judge's secretary, while the chief judge remains personally responsible for important administrative matters.[52]

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52. This chief judge has high regard for his circuit executive and has brought him into a wide variety of administrative matters, relating both to this and to subsequent chapters. The criticism quoted simply may be that the chief judge remains too involved in administration even when he does utilize the assistance of the circuit executive.

In another circuit, however, the real problem may be lack of confidence in the circuit executive. One judge mentioned a number of administrative matters that had been delegated to the circuit executive, but he was not able to carry them out and eventually one of the judges had to take care of them. These included getting a grade advancement for the criminal appeals expediter, obtaining additional lighting and speakers for one of the court of appeals courtrooms and obtaining authorization for the assignment of magistrates to another district to handle old habeas corpus cases.

We were initially concerned that the circuit executive's failure to resolve those problems might be an indication that the Administrative Office was not handling the requests of circuit executives generally, thereby requiring involvement and intervention by a circuit judge in all but the most routine matters. However, further inquiry did not reveal any systemic problem. In several other circuits, judges commented that the circuit exective was very effective in dealing with the Administrative Office. Some said he was more effective than they could be, because he knows the procedures and people. In any case, they said they would not undercut his authority by going directly to the Administrative Office.

Much depends on the style and preferences of the chief judge. For example, in one circuit the situation may be improving as a result of a change in chief judges. There are strong indications that a former chief judge simply did not utilize the circuit executive, but preferred to handle all matters on a personal basis. The new chief judge also intends to be personally involved with administrative matters, as he emphasized that all of his three law clerks would have training in judicial administration. However, the present chief judge has expressed determination to fully utilize the services of the circuit executive.

While relieving the chief judge of narrowly administrative tasks was intended to be one of the principal duties of the circuit executive, it was clearly not intended to be his sole function. One of the problems this study has revealed is that a number of circuit executives are spending so large a portion of their time and energies as administrative assistants that they have inadequate time for other tasks. Only in the Second Circuit has there been a significant delegation or

reassignment of administrative responsibilities by the circuit executive to members of his staff.[53]

The circuit executive for the D.C. Circuit has made a concerted effort to avoid becoming involved in routine administrative matters. He has generally avoided any role in the routine operations of the clerk's office, and has attempted to avoid spending his time and energies on minor administrative or housekeeping matters that can be handled by the clerk or others.[54] With the help of the various staff available

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53. It must be noted that the circuit executive's staff in the Second Circuit is substantially larger than that in any other circuit. At the time of our visit he had available a research analyst, a program analyst who helped with public relations, a computer analyst, a GSA liaison person, and an attorney (the motions clerk) who performed some law-related work for the circuit executive in addition to other duties. Also included are several secretaries who serve the circuit executive and staff attorneys' offices. This staff enabled the office to sustain many more tasks than others have. The positions were assembled from varied sources, including one-time projects supported by the Judicial Conference of the U.S., and positions based in the clerk's office.

We are not inclined to criticize this as "empire-building"(we heard the criticism often, mostly outside the Second Circuit). We feel that the Second Circuit staff is not large in relation to tasks performed: limited staffing remains a limitation on the work the executive can undertake.

54. The D.C. Circuit executive views his position as staff to the chief judge, the judicial council and the

he seems to have succeeded in reducing burdens on the chief judge to the feasible minimum.

All of the other circuit executives seem to be significantly involved in routine matters of an "administrative assistant" character. Perhaps because there has been no one else for much of this, some circuit executives are spending too much time as administrative assistants. In the Third Circuit the construction of a new courthouse created an enormous administrative burden. In the Eighth Circuit the circuit executive spent substantial time as administrative assistant to the chief judge, handling such things as parking spaces, space allocation, telephones and dealing with GSA. In two other circuits, several judges confirmed the impression that the circuit executive was spending too

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court, not as an administrative assistant. Although one judge suggested that the chief judge delegated a great deal of administrative responsiblity to him, we observed little involvement in routine administrative matters. The circuit executive's position in this regard has obvious merit for the time and place: the circuit executive had no staff, and routine matters were or could be satisfactorily handled by others. In general however, we would hope, as each executive has an assistant and possibly other staff available, that they would be able to provide routine assistance as well, as needed.

much time on administrative matters. Some circuit judges were very emphatic in commenting on the "trivial" nature of many duties assumed by the circuit executive. Yet several other circuit executives said they spent little time on routine administrative matters.

We believe the circuit executive can be of great value to the chief judge by handling the routine administrative functions. The following examples may suggest areas where an even greater contribution is possible in some circuits.

Personnel

According to the Act, one of the responsibilities that should be assigned to the circuit executive is "administering the personnel system of the court of appeals of the circuit." All have occasionally been asked to assist with special problems. At least seven of the ten circuit executives have been further involved in personnel matters and policy in varying degrees. In three circuits it appears that the circuit executive's primary role is to coordinate the search for supporting personnel other than those employed in the clerk's office. These include library personnel and staff attorneys. In the D.C. Circuit the circuit

executive has been involved in the staffing of senior level positions within the court of appeals, including the clerk, chief deputy clerk, senior staff attorney and librarian. Also, at the request of the chief judge, the circuit executive has provided advice to the clerk of court as to hiring practices. In addition, the circuit executive was assigned the task of handling a serious personnel problem in the clerk's office.

In other circuits, for example the Third, the circuit executive has not been involved in the actual hiring of personnel, but has conducted staffing studies for the clerk's office and has assisted in obtaining additional personnel for the clerk's office. In the Tenth Circuit the circuit executive was initially given authority for the hiring, firing and promotion of all clerk's office employees.[55]

There have also been some efforts to improve internal operating procedures with respect to personnel.[56] Several circuit executives have established

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55. See chapter III, infra. at 93-97.

56. While these efforts relate directly to some of the following chapters, they appear here to provide a more complete picture of personnel-related activity.

secretarial pools serving all the judges with chambers in the main building of the court of appeals. The Fifth and Tenth Circuits prepared comprehensive personnel manuals under the circuit executive's direction. Several other circuits expect to prepare manuals in the near future.

An example of more substantial involvement in personnel matters comes from the Second Circuit, where the circuit executive made a study of hiring practices within the clerk's office and related offices, and developed an equal opportunity plan for the court of appeals. In addition, he developed a merit award program available to the entire circuit (district courts as well as the court of appeals). More than one judge noted that morale within the circuit clerk's office had improved following the circuit executive's initiatives, and the court was attracting better qualified people to fill vacancies.

The Second Circuit executive established a circuit-wide grievance procedure for court employees, perhaps the first of its kind. Notably, the procedure provides a right of appeal to the circuit executive, thereby providing a reasonably independent review that

remains in the court system, yet does not burden a judge or judges with the associated fact-finding or decision.

The Second Circuit executive had a major role--by invitation--in recruiting a clerk in a district court (see chapter V). He also has conducted many special projects serving personnel of the whole circuit. These have included, for example, a detailed analysis of the alternative health plans, and extensive liaison work with Blue Cross to try to speed payments and simplify filing procedures.[57]

Library

Almost all circuit executives have played a role in the establishment, improvement or operation of the court of appeals' library. Management and policy for libraries was an area of special need when circuit executives were appointed; most of them gave it special attention. In the Third Circuit the executive was responsible for all of the administrative matters relating to the establishment of a consolidated library in the Philadelphia courthouse, and satellite libraries

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57. Other circuit executives have also done some of these things; this listing is not meant to be exclusive.

in Wilmington, Pittsburgh and Newark. The idea of such a system with professional librarians at each location came from the chief judge, but it was the circuit executive who carried the plan into operation. This included a good deal of work at the national level through the Judicial Conference, the Administrative Office, the Judicial Center and--ultimately--Congress. When he began his efforts there was no provision for the needed personnel or facilities.

A number of judges in the Fourth Circuit referred to a tremendous improvement in library services, which would not have occurred without the efforts of the circuit executive. Not only have physical conditions been significantly improved, but the professionally trained librarian is providing assistance unavailable in the past.[58]

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58. The Fourth Circuit library may be a model for a court of appeals, both in terms of its physical appearance and in the services provided to judges. The librarian (a lawyer as well) on request is able to provide a complete bibliography on legal issues for circuit judges and, on occasion, for district judges. At one time she did a summary of each pending appeal, but now only does so upon request. The court has an assistant librarian who is also a professional trained librarian, although not a lawyer.

The work of other circuit executives has also improved library services, possibly not as dramatically as in the Third or Fourth Circuit. When the circuit executive was appointed, the Fifth Circuit already had an excellent library that was a model to others in several respects. The circuit executive has helped establish three satellite libraries. In one circuit, the circuit executive was involved in enlarging the facilities of the library, and in another the circuit executive arranged for the physical relocation of the library. In addition to continuing work on the central library, the circuit executive for the Tenth Circuit is involved in consolidating the district and court of appeals libraries in Cheyenne, Wyoming. The circuit executive for the Second Circuit has been widely involved in improving the operation of the library; the chairman of the circuit's library committee mentioned that the circuit executive handled all of the problems with respect to the library and concluded that "the library is more useful to judges today because of the work of the circuit executive." The executive took a leading role in finding and hiring a librarian of exceptional qualifications and skills (especially consid-

ering the pay permitted), and is also working on establishing a district court library with a professional librarian in each of the districts.

The Budget

According to the Circuit Executive Act, one of the responsibilities delegable to the circuit executive is "administering the budget of the court of appeals of the circuit." Although several circuit executives mentioned that they were involved in budgeting, this appeared to us to be a largely meaningless function under the existing circumstances. Budgetary allocations are not made in the circuits; most items are specifically allocated from Washington, leaving the circuit executive with the limited--though sometimes crucial--role of advocate for courts in the circuit. True, the circuit executives in most circuits have been given the authority to handle the furniture budget for the court of appeals (sometimes the whole building). However, this is a rather small element of the court of appeals' expenditures and several circuit executives commented that the task was not a significant or substantial one. Several circuit executives emphasized their role in collecting and consolidating the respective budgets of

the units within the court of appeals (clerk's office, staff attorneys, libraries, etc.), and then consolidating those requests for submission to the Administrative Office. Similarly, in some circuits the circuit executive collects, combines and consolidates the requests of the district courts and forwards them to the Administrative Office.

However, it appears that the circuit executive is largely bypassed in the budget process, though occasional successes at "advocacy" were reported. Decisions are made by the Administrative Office, the appropriate Judicial Conference committees and Congress. Several circuit executives commented that they really had no significant input in the budget allocation process. They also do not, of course, have the authority to allocate funds either within the court of appeals or among the district courts. Several observed that the decentralization implied by the Circuit Executive Act has not been realized. Some observed also that the circuits sometimes are not kept sufficiently informed even to provide needed support at crucial times as their proposals move through Administrative Office and Judicial Conference mechanisms.

Possibilities and opportunities for decentralization remain, however. Several proposals have been developed in the Second Circuit, largely at the initiative of the circuit executive. Most interesting at present is the "incentive budget" now under development in the Financial Management Division of the A.O., providing support to new projects. It should be noted, however, that at least one circuit executive opposed decentralization of the judicial budget on the grounds that there is little scope for decentralized budgeting in the judiciary. We found only limited interest among judges in decentralized budgeting, or in increased circuit-wide management otherwise.

Space and Housekeeping

Problems relating to space, building improvements and maintenance occupy a significant portion of the time and energies of most circuit executives. The circuit executive for the Third Circuit spent a very large portion of his time on planning for the new courthouse. Several Third Circuit judges emphasized that the circuit executive had saved a great deal of their time. They mentioned that the move to the new building went very smoothly. However, the work certainly pre-empted

a great deal of the circuit executive's time, as much as one-half to three-fourths over many months. (Probably some of this would previously have been handled by the circuit clerk).

Judges in the Fourth, Seventh and Tenth Circuits noted that building maintenance and repair problems in the past were handled by the chief or a resident judge (and his secretary), but were now handled by the circuit executive. In the Second Circuit the overall appearance and condition of the courthouse has substantially improved during the past few years, an improvement which several judges attributed directly to the circuit executive.[59]

Some circuit executives kept the time they spent on housekeeping matters to a minimum. For example, the Seventh Circuit executive indicated that while he does deal with the Administrative Office and GSA with

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59. In a letter supporting Mr. Lipscher's nomination for the 1976 Rockefeller Public Service Award, Judge Milton E. Pollack emphasized the tremendous improvements in the courthouse facilities during the past years. Specifically he mentioned a multi-million dollar renovation program, improved elevator service, modernization of the telephone system, refurbishing of the jury assembly room and the addition of a snack bar, all of which "were the direct result of Lipscher's efforts."

respect to furniture and other housekeeping matters, it does not take a substantial amount of his time because he can rely on the judges' secretaries. The Sixth Circuit executive also indicated that this type of work was not a great burden, although he was responsible for remodeling the courthouse. Most routine matters were handled by his secretary, and he has only become involved with them when the situation became serious. (He feels this may change, however, with the impact of some impending major projects.) The circuit executive for the Tenth Circuit minimized the burden of administrative matters, particularly with respect to GSA.

In view of the general concern for courthouse safety and security it was surprising that several judges complained that the circuit executives have not had significant impact on security programs at their facilities. However, we are inclined to discount some of these complaints, as nearly all circuit executives have played a major role in security. In the Second Circuit, the circuit executive, through a Building Operations Committee including two judges and himself, was responsible for coordinating day-to-day problems resulting from conflict of responsibility between the

GSA guards and the marshals. The Fifth Circuit executive has played an important part in resolving similar problems. The Tenth Circuit executive has met with the security coordinator from the Marshal's Service concerning security in every courthouse in the circuit; numerous significant modifications have resulted. The circuit executives as a group took a leading role in changing certain GSA proposals that appeared to threaten courthouse security by reducing manpower drastically.

Recruitment Of and Accommodations For Visiting Judges

All courts of appeals use visiting judges to some degree. Although never enumerated as one of the suggested functions of the circuit executive, the responsibility for arranging for visiting judges is a task that the chief judge could be expected to delegate to the circuit executive, at least in part. However, in most circuits the actual recruitment of visiting judges, particularly those from outside the circuit, is considered too sensitive to be handled by the circuit executive. There seems to be a general feeling that a request to serve as a visiting judge should come either from a chief judge or from some other judge; it might

appear demeaning or thoughtless for a judge to be invited by the circuit executive.

Thus, in some circuits the chief judge handles a significant part of the recruitment of visiting judges. In nearly all, the chief judge or a designated judge makes the initial contact. Increasingly, however, the circuit executive identifies possible judges (appraising their availability), and determines the need; the chief judge handles the formal contact only. The circuit executive handles the follow-up by arranging for chambers for visiting judges.

The Ninth Circuit makes greater use of visiting judges than any other, and the primary responsibility for recruiting judges falls to the circuit executive. He routinely submits a questionnaire to all district judges within the circuit (both active and senior) asking them to indicate if and when they will be available to sit with the court of appeals. The circuit executive then prepares the court's calendar utilizing senior judges and active district judges. He then contacts judges from outside the circuit, generally senior district and circuit judges who have sat with the Ninth

Circuit in the past or who have indicated a willingness to do so.[60]

The arrangements are a major task in the Ninth Circuit. While the circuit executive has undoubtedly saved a great deal of the chief judge's time in recruiting judges, one circuit judge mentioned that some district judges resent being contacted by the circuit executive, and prefer that the request come directly from the chief judge. Visitors from outside the circuit made the same observation.

These comments suggest that the circuit executive can be fully effective only if he is treated, in administrative matters, as a professional equal by all judges. If he is viewed as a "managing partner," judges should not resent dealing with him simply because he is not a judge, any more than they resent dealing with the director of the Administrative Office or of the Federal Judicial Center. Where the circuit executive is responsible for scheduling terms of court,

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60. The personal contact with out-of-circuit judges was, in the past, handled by the chief judge. Under the present chief judge this responsibility also has been delegated to the circuit executive.

he is the one who knows when additional judges will be needed and is in the best position to attempt to find whatever additional help is needed. While a courtesy call or letter from the chief judge is needed and appropriate at some point, in the view of the Ninth Circuit chief judge it is sensible to delegate the responsibility for all details and for the initial contact to the circuit executive, a view we share despite its relative unpopularity among judges.

Criminal Justice Act Vouchers

As with many aspects of this project, the magnitude of the problem associated with approval of Criminal Justice Act vouchers varied so much from circuit to circuit that the circuit executive's impact is hard to appraise. In some circuits the chief judge, other circuit judges and the circuit executive passed off the responsibility as being a rather minor one that took very little time. In other circuits it seemed to be the principal routine administrative burden, not only on the chief judge but on other circuit judges and the circuit executive as well. The Act (18 U.S.C. § 3006A) requires the chief judge of the court of appeals to approve all vouchers for excess payments, those in excess

of the limits established by the Act, for trial and appellate court representation. In two circuits (the Fourth and Fifth) the circuit executive is substantially involved in processing and approving vouchers for appellate representation, as well as "excess vouchers" from the district courts.

The procedure employed by the Fifth Circuit[61] seems to function quite effectively. The judicial council first developed standards and guidelines for rates and approvable expense items, and then authorized the circuit executive to approve all claims for appellate representation within the statutory maximum. Previously in the Fifth Circuit, as is still the case in most circuits, vouchers were submitted to the presiding or the authoring judge of the panel that heard the appeal. A number of Fifth Circuit judges felt that the present system saved substantial judicial resources, enhanced circuit-wide uniformity and reduced or eliminated overpayments.[62] Requests for fees in excess of that per-

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61. The Fourth Circuit approach seems to be essentially similar.

62. The attorney retains a right to seek review of the circuit executive's decision by the court, but seldom does so.

mitted for appellate representation are referred to the chief judge with the circuit executive's recommendation. In a few cases where the request is troublesome, the circuit executive discusses the matter with the authoring judge or one or more of the panel members prior to making his decision or recommendation.

With respect to excess district court vouchers the circuit executive first examines the vouchers to insure there are no errors or improper charges. Then, using the formula approved by the judicial council, he makes a recommendation to the chief judge, who generally follows those recommendations. Again, if the request seems unusual, the circuit executive discusses the case with the district judge submitting the voucher prior to making his recommendation to the circuit chief judge.[63]

In the Fifth Circuit there are a very large number of vouchers submitted for approval (an average of 45 to 50 per month). If the circuit executive's involvement saves the chief judge as little as ten minutes per voucher, a total saving to him of one day per month

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63. The circuit executive estimated that only two to four percent of the vouchers require a discussion with the trial judge.

would be realized, in addition to what is saved the panel judges on appellate vouchers within the statutory maximum.

Personal involvement of the circuit executive in approval of Criminal Justice Act vouchers seems minimal in most other circuits,[64] though we are informed that this has changed since our visit in at least one circuit. One circuit has determined that the circuit executive cannot adequately handle CJA vouchers since he is not an attorney and apparently does not have the requisite feel for the relative complexity of legal issues presented in a particular case.[65]

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64. Although discussions with the circuit executive and several judges in the Sixth Circuit produced conflicting views on the circuit executive involvement in CJA vouchers, it appears that he is involved only in processing excess compensation vouchers from the district courts requiring the approval of the chief judge of the court of appeals. He reviews those requests and makes a written report on recommendations to the chief judge. With respect to vouchers for appellate representation, one circuit judge indicated he did not believe the responsibility for approving Criminal Justice Act vouchers could or should be delegated to the circuit executive. He endorsed the present procedure, whereby the authoring judge reviews and decides all claims for fees.

65. The legal background of the circuit executives in the Fourth and Fifth Circuits seems particularly relevant to their involvement in review of CJA vouchers. A number of judges commented that their general legal

Although the Second Circuit executive has not been involved in the actual review and approval of CJA vouchers, he developed a procedure for handling them. After the procedures were adopted and implemented the responsibility for reviewing vouchers and making recommendations was delegated to a deputy in the clerk's office. The scheme requires that requests for compensation be filed prior to the date of oral argument so that the presiding judge of the panel can determine from the nature of the argument and the briefs whether the requested amount should be approved. However, according to one judge the vouchers have not always been submitted on time and, therefore, the presiding judge is not alwlays able to consider the request at the time of oral argument. If that happens, the presiding or authoring judge, at some later time, must review the files and briefs in order to determine whether the case merited the requested fee. This inconvenience has now been remedied by a mechanism to control submission of the voucher, assuring it is available at oral argument.

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awareness and knowledge of appellate practice made it possible for them to adequately assess the complexity of issues presented in each case.

Correspondence and Reports

Another way the circuit executive can assist the chief judge is with correspondence, reports, speeches, and congressional and other statements. In several circuits the circuit executives have handled routine correspondence for the chief judge, either directly or by preparing letters for the chief judge's signature.

Nearly all circuit executives have been actively involved in the preparation of major statements and reports. They have often helped draft "state of the circuit" messages, and other policy statements of the chief judge. In the Fifth Circuit, for example, the circuit executive has assisted in preparing reports and accompanying statistics for the chief judge's use in his annual state of the circuit message, as well as presentations to the Administrative Office, circuit Judicial Conference, Judicial Conference of the United States, and Congress. In the Ninth Circuit, the circuit executive has been extensively involved in preparation of studies of possible methods of administratively dividing the circuit.[66] There is now an attor-

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66. See, Omnibus Judgeship Act of 1978, Pub. L. No. 95-486, 92 State. 1633, 28 U.S.C. § 41.

ney assigned to this full time.

Nearly all circuit executives were instrumental in preparing reports and statistics for use by the chief judge in justifying additional judgeships for the courts of appeals. Especially notable in the D.C. Circuit was the executive's success in defining and justifying a unique standard applicable to this circuit only. This standard, based on the unique caseload of the circuit, was accepted by the Judicial Conference of the United States and Congress.

Public Relations and Liaison

The Act contemplates that the circuit executive will act as the circuit's representative in dealing with state and local bar associations, civic groups and the news media. In so doing, the circuit executive not only acts as an administrative assistant to the chief judge but provides an important public relations service that has generally been ignored by the federal courts. This is an example of a new function the Act facilitates.

The Second Circuit has made the greatest effort to develop improved relations with the news media and the public, recently employing a program analyst on the

staff of the circuit executive who also serves as press officer. The circuit executive has prepared press releases dealing with such matters as comments of the chief judge relating to the work of the circuit, approval of the Speedy Trial plans within the circuit, innovations in the courts of the circuit (sometimes in response to specific requests by district courts), the state of the courts' dockets, and the annual report of the circuit executive.[67]

The Second Circuit also has a regular newsletter, produced and edited by one of the circuit executive's staff assistants. Several of the other circuit executives indicated that they hoped to establish a newsletter, but had not found the time or staff, or reached an agreement as to its nature and content. (Some have begun publications since our visits.)

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67. The chief judge and the circuit executive were also involved in a program whereby students from three New York City high schools were introduced to the appellate process. After an orientation on appellate practice and procedure in general, they were given a briefing on a case and heard its oral argument. This was followed by a question and answer session with the attorneys. The students were then required to write an opinion indicating how the case should be decided. After the court rendered its decision, the students met with the circuit executive, who explained the court's opinion and discussed it with the students.

In at least three circuits the circuit executive serves as the courts' liaison with various lawyer groups. In the Fourth Circuit he serves as secretary to the State-Federal Council of Virginia, composed of four state and four federal judges, and was apparently instrumental in the creation of the council. He has also worked with a local community college that is developing a program for court reporters and has established a law school program to assist federal prisoners. In the Ninth Circuit the circuit executive is a member of the Federal Court Committee of the California Bar Association and has worked closely with the committee in drafting its recommendations and proposed alternatives regarding circuit realignment. The Third Circuit executive staffs the Lawyers' Advisory Committee, a valuable link between bench and bar.

Several circuit executives have been extensively involved in the preparation of the circuit histories, which were part of the Bicentennial commemoration. In the Second, Sixth, Eighth and Tenth Circuits the circuit executive served as a sort of managing editor coordinating the efforts of the contributors and arranging for printing and distribution.

Miscellaneous Administrative Matters

Several new judges commented that the circuit executive was of particular help to them when they were appointed. He helped in arranging for their chambers, obtaining furniture and office equipment, and generally familiarizing them with the operation of the court.

In only two circuits (the Eighth and Tenth) were there indications that the circuit executive had been involved in "maintaining a modern accounting system," one of the tasks contemplated by the Act. In the Tenth Circuit the circuit executive has combined a number of trust funds for improved administration. As with several of the suggested functions in 28 U.S.C. § 332(e), accounting at the circuit level is less consequential than Congress seemed to imagine, in the absence of some kind of fiscal decentralization.

Several circuit executives have been involved in the printing of court of appeals decisions. In the D.C. Circuit the circuit executive performed a cost analysis of printing costs and made recommendations to the court. In both the Fifth and Ninth Circuits the circuit executive handles the details of the contract for printing slip opinions and arrangements with the

Administrative Office, and they were involved in setting up the new systems in place there. (In the Fifth Circuit the principal negotiations with the Administrative Office and the publisher were handled at the outset by a judge committee.) In the Second, Fourth and Tenth Circuits, the circuit executive monitors the printing of slip opinions. The Tenth Circuit executive has also been involved in forms management for the court of appeals and for the district courts. Utilizing printing equipment available in the court of appeals for slip opinions, he has developed a kind of central printing service in Denver, serving the whole circuit. He has seized this opportunity to achieve considerable circuit-wide standardization of forms.

Conclusions

The Act clearly contemplates that the circuit executive was intended to serve, in part, as administrative assistant to the chief judge as well as other judges of the court, relieving them of administrative burdens to the extent possible. Unfortunately, it cannot be said that the circuit executives as a group have been entirely successful in achieving this goal. In many circuits the chief judge is unwilling or unable to

delegate important administrative matters to the circuit executive. In a few, the circuit executive has not demonstrated the ability to discharge such responsibilities.

There remains a feeling among many judges that the chief judge should be the one who deals on a personal basis with judges. Perhaps this was most notable in the Fourth Circuit, where district and circuit judges alike commented on the ease of access to the chief judge. The chief judge emphasized the desirability of maintaining lines of communication with the district court judges.

Although they complain about administrative burdens, many chief judges seem to enjoy their administrative role and feel that they are particularly effective in dealing with other judges as well as with the Administrative Office. Some seem reluctant to transfer these responsibilities to the circuit executive. This may change in time, as the incumbents are replaced by new chief judges who have developed their style of management with a circuit executive available. If the circuit executive is to serve a significant function as administrative assistant to the chief

judge, it seems essential that each chief judge carefully evaluate his administrative tasks in order to determine which can be turned over to the circuit executive. In some cases, particularly in dealing with district and circuit judges, it may be necessary to inform others of these changes, and to seek their assistance and cooperation with the circuit executive as the representative of the chief judge.

While there has not been the anticipated reduction in the administrative burden on the chief judges of the circuits, this is not because the circuit executives have not, in general, been extensively involved in administrative matters; on the contrary, they have made many major contributions. But in several circuits it was our observation that the circuit executives were so burdened with routine responsibilities that they had little or no time for others.[68] While it is certainly true that the chief judge should not be required to spend his time and energies on parking permits and

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68. This may be unavoidable in some degree in the Fifth and Ninth circuits, whose size, both in terms of territory and number of judges, make the administrative burdens significantly greater than in other circuits.

minor facility modifications, neither should the circuit executive.

The problem may be that there is simply no one to handle the routine administrative chores. They should not fall to the circuit executive or the clerk of the court, both of whom are high-level administrators with many important duties.[69] It may be that there continues to be a need for an administrative assistant in courts. This function probably should lie with the circuit executive, and be absorbed into his office (using increased staff as necessary). The circuit executive should be in a position to assume all administrative tasks that do not specifically require the chief judge for symbolic, protocol, policy or statutory reasons. Nearly all matters that involve routine organizational maintenance and do not clearly fall within

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69. While some judges utilize their personal law clerks for administrative matters, this may not be a uniformly satisfactory solution due to the lack of experience and administrative training of most law clerks, and the fact that they remain for only a year or two. Often the senior secretary for the chief judges acts as an administrative assistant; in some cases she has been extremely successful in handling routine matters for the chief judge. The problem, of course is that any time devoted to administrative matters keeps her from handling the other secretarial duties.

the clerk's office or another support operation can be under the circuit executive.

Finally, as suggested by the judges of several circuits, Congress should give attention to the question of legislative changes to assign administrative chores to the circuit executive. The most obvious example is approval of Criminal Justice Act vouchers. This is clearly a ministerial task, albeit one that requires experience and judgment. While it may be that a non-legally trained person or one without substantial experience in appellate practice would be unsuitable, it does not seem that approval of compensation vouchers should require the time and attention of Article III judges. Some have suggested also that approval of routine council matters, such as salaries of part-time magistrates and bankruptcy judges, should be given to the circuit executive. Again, while approval of such salaries clearly requires an understanding of the tasks and functions of these officials, as well as their particular workload, it should be properly assignable to a high level administrative officer.

CHAPTER III

THE CIRCUIT EXECUTIVE AND MANAGEMENT OF THE COURT OF APPEALS

Prior to the Circuit Executive Act, the clerk of the court of appeals was clearly the chief administrative officer for the court. In most circuits the clerk was responsible, for example, for (1) exercising administrative control of all non-judicial activities of the court of appeals, (2) administering the personnel system of the court of appeals, (3) administering the limited budget of the court of appeals, (4) maintaining an acounting system with respect to funds received by the clerk's office as well as the court trust funds, and (5) establishing and maintaining property control records. The clerk accounted for property associated with his office and also, in many cases, property in the chambers of the circuit judges, courtrooms, and elsewhere.

In some circuits the clerk often conducted studies related to the administration of the courts as requested by the chief judge or the judicial council. These studies involved collection, compilation and analysis of statistical data, and recommendations

wherever appropriate (relating primarily to the business of the court of appeals). Most clerks arranged for meetings of the judges of the circuit (especially the annual Judicial Conference, and the Judicial Council), prepared the agenda of these meetings and served as secretary for the Council. Many clerks prepared the annual calendar for the court of appeals, establishing the number of terms when the court sat and the location.[70] Finally, the clerk had and has had specific duties assigned to him by statute or by Administrative Office directive.

In 28 U.S.C. § 332(e), nearly all these duties are specifically mentioned for possible delegation to the circuit executive. The potential for conflict with the work of the circuit court clerk is obvious, as is the corresponding need to define the responsibilities of the two officials. This chapter will define and evaluate three general patterns that have developed in the

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70. Although the clerk would subsequently select particular cases for each day of the term, in most circuits the responsibility for assigning judges to particular panels was handled by some one other than the clerk (usually the chief judge), to avoid any suggestion that particular judges were selected to hear particular cases. See chapter IV, infra., esp. at 142-144.

duties of circuit clerks and circuit executives.

The need for a new circuit executive position specifically to manage the court of appeals is open to question. Among the variety of persons and groups who supported the Act, the impetus unquestionably came from Chief Justice Burger, who seems to have held federal clerks of court in rather low esteem, at least in relation to the needs.[71] To Chief Justice Burger and others, the needs were immense, apparently well beyond the capacities of incumbent clerks. This notion was challenged only by the spokesman for the Federal Court Clerks' Association, who stressed that clerks of court, when given appropriate staff assistance, could perform all of the functions suggested in the proposed bill.[72] He opposed the establishment of the circuit executive position without further study of the need. Support for the Act by the APA, the Administrative Office of

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71. In his comments at the Institute of Judicial Administration breakfast, August 12, 1969, supra, note 3), Chief Justice Burger indicated that in his opinion there were at that time only a handful of qualified professional court administrators; virtually all of them were in the state court systems.

72. See page 10, supra.

the United States Courts, the Judicial Conference of the United States and most courts of appeals may be viewed in part as support for the Chief Justice's view that the incumbent clerks were inadequate to the larger responsibilities he envisioned. On the other hand, it may simply suggest a reluctance to reject additional staff assistance for undermanned courts.

There was little effort to define the respective responsibilities of clerk and circuit executive before passage of the Act. Chairman Emanuel Celler of the House Committee on the Judiciary did raise the matter with one witness, Bernard G. Segal. Mr. Segal emphasized that the new position was clearly intended to be superior to that of clerk,[73] but also said he anticipated that the clerk would be autonomous in some of his traditional functions. Mr. Segal said, "I envisage the clerk would have direct charge of the administration of the litigation side of the court."[74]

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73. July Hearings at 31.

74. Id. at 33. However, this statement is limited by his earlier statement (at 31) that the circuit executive would assume the powers to appoint and remove personnel under 28 U.S.C. § 711.

The most specific testimony distinguishing the two positions was by Mr. Friesen. He saw them as so different that overlap or conflict was unlikely. The clerk would deal with such matters as "the legal necessity for an accurate record," while the circuit executive dealt with the broader tasks "to make the whole court work together as efficiently as possible . . ."[75] Newell W. Ellison, Chairman of the Committee on Administration of Justice, Washington, D.C., urged that the Act should specify the duties expected of the circuit executive, or "we may wind up with nothing more than a glorified Chief Clerk under a new name."[76] It was his view that no one was carrying out the duties he suggested,[77] most of which are in the present statute. The testimony of Mr. Friesen and Mr. Ellison distinguishes the two positions clearly enough, but their views are consistent only with a narrow, non-managerial conception of the clerk's position.

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75. November Hearings at 371. See also pages 377-381 and Senate Hearings at 301.

76. November Hearings at 427.

77. November Hearings at 434.

Even after the Act was passed, few circuits gave much thought to the overlap and conflict between the positions.[78] Only the Fifth Circuit indicated concern, in a comprehensive study of the circuit executive position. The recommendation of the study was not necessarily desirable, however: it was to place the two positions on an equal basis, and to prohibit the circuit executive from significant involvement in the management of the court of appeals.

The failure to adequately define and delineate the roles and responsibilities of these two administrative officers has been and remains a major impediment to effective implementation of the Circuit Executive Act. The problem is severe in about half of the circuits. The result has been conflict, grudging cooperation at best, and diminished effectiveness of one or both of the officers. Fortunately, in the other half of the circuits, the problem remains latent at most. In these circuits the clerk and circuit executive attempt to

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78. In at least one circuit the court apparently concluded that the clerk was not able to handle several of the functions described above. Therefore, the court felt it would be necessary to reassign many of those duties to the circuit executive.

establish roles and responsibilities that minimize conflict or overlap. However, even in these circuits a number of judges, and the incumbents in both positions, feel that the problem has been avoided only because of the efforts of the individuals involved; the potential for conflict remains.

The Sixth Circuit may present the best resolution of the potential conflict, principally because the circuit executive has focused his time and energies on assisting the judicial council and working with the district courts of the circuit. He has thus avoided the duties that are the most likely source of conflict: direct management of the court of appeals. This circuit executive has made a substantial effort to prevent his presence from subverting the role and influence of the clerk.[79]

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79. It should be noted that in this circuit, as in most others, judicial council business and court of appeals business are generally interchanged during judicial council meetings. Thus when he was clerk, the present circuit executive attended judicial council meetings and served as secretary; he has continued to do so since his appointment as circuit executive. However, at his suggestion, the clerk also attends judicial council meetings. This is essential under the circumstances, since many or most agenda items concern management of the court of appeals.

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Proponents of the Circuit Executive Act hoped that the new position would lead to comprehensive improvement in federal court management. In addition to helping the circuit chief judge with existing administrative tasks, the circuit executives were expected to fundamentally improve management and operation of the court of appeals (and also the district courts). They were expected also to extend the scope and improve the operation of the judicial councils.

However, there was little specific discussion of precise tasks. No professional staff was provided, and the courts themselves did little to define the scope of the job. Most executives were left to develop their positions ad hoc.

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Though the executives have helped chief judges, many chief judges still spend too much time on administration. They should delegate more administrative authority to the circuit executives, who would be responsible for all matters of "organizational maintenance." Many executives spend too much time on routine matters also.

III. THE CIRCUIT EXECUTIVE AND MANAGEMENT OF THE COURT OF APPEALS 73 1/G8

Although there was obvious potential for conflict, little was done to define in advance the jobs of circuit executive and circuit clerk. The relationship has been unsatisfactory in several instances. Of three ways the positions have been defined and distinguished, the most satisfactory has been a role for the circuit executive as staff to court and council. This leaves full responsibility to the clerk to manage his office, but provides an important episodic role to the circuit executive when problems or new issues arise.

IV. THE JUDICIAL PROCESS IN THE COURT OF APPEALS 110 2/C7

Some circuit executives have instituted major improvements in the judicial process, but the record has been spotty. Some courts have limited the executives' role in "judicial business," and some executives have not taken vigorous or effective initiatives in improving the judicial process. Often the executives' time was preempted by work as administrative assistant. The scope and importance of the circuit executives' successes indicate they can accomplish a great deal.

V. ASSISTANCE TO THE DISTRICT COURTS 152 2/F7

Only a few circuit executives have had a major impact in district courts. Most have been limited by competing priorities, by their identification with the court of appeals and council, and other factors. The instances of circuit executive success in district court matters indicate a large potential role here.

VI. STAFF TO THE JUDICIAL COUNCIL AND JUDICIAL CONFERENCE 188 3/B5

Circuit executives have been useful and effective in staffing the Councils and Conferences. They have not brought a dramatic expansion of council activity, as some proponents of the Act hoped (probably this was unrealistic).

Staff work to Councils and Conferences could still bear improvement. The councils should delegate authority to make decisions on minor administrative matters. The circuit executive should present data to the council in a more manageable form.

VII. TRANSITION AND GROWTH 217 3/D6

Some concluding observations about a changing role:

- The skills of a knowledgeable insider in the courts have proved important, as have legal skills. High-level managerial experience has been less important.

- Circuit executives have had to focus excessively on minutiae thus far, partly in order to establish a "track record."

- Now that the position is well established, circuit executives should be able to grow further into the more potent aspects of the job, helping to improve the judicial process in all courts in their circuits and strengthening the judicial councils. Also, it is to be hoped that they can have a larger and more direct role in the work of the Judicial Conference of the United States and the Federal Judicial Center.

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In spite of this balance at least one judge felt that conflict was inevitable. He believed that creating the office of circuit executive was a basic mistake, since historically the clerk has been considered to be head of the "Anglo-Saxon courts." He felt that creation of another executive position naturally results in potential overlap and conflict.[80] Although other Sixth Circuit judges support the idea of co-equal positions, as in the Fifth Circuit, this judge believes that eventually there must be a line organization placing the circuit executive above the clerk.

Many have suggested that the circuit executive should be "first among equals" in relation to the clerk. To us, this formulation is an evasion that has helped create unnecessary confusion. It is impossible, logically and practically, to have someone first among true equals. Although the clerk of court of the Sixth Circuit has high regard for the present circuit executive and believes they work together complementarily,

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80. In spite of his views as to the traditional preeminence of the clerk he feels that the court and council have given too much responsibility to the clerk, and not enough to the circuit executive.

he believes there is a systematic conflict between the role of circuit clerk and circuit executive, particularly with respect to control of the staff attorneys' office. The clerk feels that the staff attorneys are an integral part of the case management operation of the court of appeals. Thus, in his view, they should be within the clerk's area of responsibility. He points out that the deputy clerks assigned to a specific case work closely with the senior staff attorney, and the staff attorney responsible for the case. The clerk understandably feels that his office is principally responsible for case management in the appellate process, and comprehensive responsibility for this process should rest with the clerk rather than the circuit executive.[81]

There are greater difficulties in other circuits.[82] In two circuits the conflict has reached the

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81. The concerns expressed by the clerk were only prospective in nature; he gave no compelling examples of actual difficulties or conflicts that had occurred to date.

82. It is possible that most of the difficulties result from specific, one-time conflicts involving present incumbents, and will disappear in time. Conflict for a time was built in by the Act, imposing as it did a new position superior to one held normally by a per-

point that several members of the court found it necessary to impress upon us that, in their view, the clerk is the more valuable and important in his service to the court. They emphasized the contributions of the clerk to the smooth functioning of the court of appeals, and pointed out failures or limitations of the circuit executive. In one circuit a number of judges commented during interviews that the clerk was a "superb administrator" who had done an excellent job in handling responsibilities of the clerk's office. In particular, he relieved the judges of both administrative and quasi-judicial responsibilities, the latter with respect to ruling on routine motions dealing with preparation of the record, filing briefs, etc. (The responsibilities of this clerk, however, seemed to us fairly typical rather than exceptional.)

One judge, emphasizing the assistance the clerk had rendered to the court, suggested that he should

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son accustomed to considerable autonomy. In addition, several clerks tried to obtain certification and appointment as executive, but failed. All we can confidently say is that conflicts are prevalent; we do not know if they are systemic and will recur, or if they result from an unlucky combination of unique histories.

receive a higher salary than the circuit executive. Indeed, the judicial council once instructed the chief judge to advise the Judicial Conference of the United States of its belief that the salary of the clerks of the courts should be "substantially increased," to be close to or equivalent to the maximum allowable salary paid to the circuit executive.[83] The major concern expressed by most of the circuit judges was that the circuit executive's lack of legal training precluded him from being involved more significantly in the management of the court of appeals.[84] One circuit judge even suggested that the circuit executive position be abolished, and the funds made available for providing middle management positions in the court of appeals and district court clerks' offices.

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83. This circuit also declined to grant the incumbent circuit executive the full amount of an authorized raise that would have placed his salary significantly above that of the clerk.

84. The circuit executive expressed frustration in his efforts to become involved in analytical studies of the operation of the court, not because of his lack of legal training but because the clerk and his staff are allegedly "too busy" to assist the program analyst with such studies.

Surprisingly, the incumbent clerk was more willing than the judges on the court to recognize the value of the position of circuit executive, and the contribution that the incumbent had made to the circuit, particularly the clerk's office. He did not seem challenged or threatened by the presence of the circuit executive, or his involvement in such tasks as personnel.[85]

In another circuit, the emphasis was not so much on the accomplishments of the clerk, although several judges did mention his knowledge and experience, but rather on the failure of the circuit executive to accomplish tasks assigned to him. As a result, the conclusion again was that the clerk had been of greater value to the court than the circuit executive.[86]

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85. Apparently the circuit executive was able to obtain several additional positions for the clerk's office which neither the clerk nor the chief judge had been able to obtain in the past. Understandably, the clerk was pleased with the circuit executive's assistance in this regard. This episode demonstrates that the circuit executive can help the clerk without interfering with his duties or authority.

86. Several other judges felt that, while the circuit executive was "not earning his pay," it was because he had not been given sufficient responsibility, rather than because of any lack of ability.

At one time we felt that comparisons of the relative value of clerk and circuit executive (often volun-

A different problem exists in another circuit where the circuit executive is the former clerk of the court, and the present clerk was his chief deputy. This factor seems to have contributed to the present unsatisfactory operation of the clerk's office. While a number of judges commented that the circuit executive should have a role in the clerk's office, they explained that this was not possible due to the personalities of the individuals. It had been necessary to exclude the circuit executive completely from the operation of the clerk's office, but harmony still has not been achieved. The circuit executive indicated that he is not significantly involved in the operation of the clerk's office (he does serve as circuit personnel officer and handles some law-related problems--the

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teered in our meetings, particularly in reference to their pay) were irrelevant to the purposes of this report. The two offices are different, and comparisons seem invidious. We now conclude that those observations contributed to our understanding of the office and raise a legitimate question. It is not enough to show that the circuit executives are busy, as nearly all are. The important question is whether they meet the expectation of Congress (in setting the pay at Executive Level V) that their duties would be the most important of any duties handled by support personnel. The quoted judges do not think so.

latter could not be handled by the clerk, who is not a lawyer). However, the clerk recounted numerous instances of what he perceived to be unnecessary interference by the circuit executive in the management of the clerk's office. A number of judges indicated that, ideally, there should be some degree of line responsibility between the circuit executive and the clerk, but they said no such relationship was possible under the circumstances.

Three rough patterns seem to have developed in the ten circuits employing circuit executives. First, some circuit executives act as administrative director of the court of appeals, exercising limited line supervision over the clerk and other subordinate offices, including the library and staff attorneys' office. Second, some circuit executives serve as one of the "co-equal" branches or divisions of the administrative side of the court of appeals. The circuit executive is treated as equal with the clerk, as well as with the librarian and senior staff attorney. Finally, some circuit executives fill no line function, but serve as principal staff assistant to the chief judge and to the court of appeals. Their role in clerk's office opera-

tions is supervisory, but only in the sense that they act as representative of the chief judge and court.

Administrative Director

As we see it, in the Second and Tenth Circuits, and in less degree in the Seventh, the circuit executive serves as a kind of director of administrative services over the clerk's office, library and staff attorneys. The relationship has worked especially well in the Second Circuit. The role or involvement of the circuit executive in the operation of the clerk's office relates primarily to organization, staffing and general policy, not to day-to-day supervision. The circuit executive does not try to "run the clerk's office" or to interfere with the clerk's control of his personnel. As a result, the clerk evidenced no resentment toward the circuit executive. In fact, he felt that the circuit executive was, in a sense, a staff assistant to him. He emphasized that he had not been trained as a "manager"[87] so he respected the fact that

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87. In general this would not be true of clerks hired more recently, of whom many are graduates of the Institute for Court Management, and nearly all have been selected largely for managerial skills and experience.

the circuit executive had been selected for the position, at least in part, on the basis of his managerial ability and experience.

The managerial skills of the court executive in the Second Circuit have not gone unnoticed by the judges of the circuit either. A number of judges commented on the recent improvement in the operation of the clerk's office. A key change that occurred soon after the circuit executive was appointed involved the reorganization of the clerk's office from an assembly line operation to a cluster or team structure. In the present system small groups of personnel are responsible for all aspects of a case as it proceeds through the court of appeals. Apparently all are very satisfied with this change in organization, and the opportunity for case management it provides. One judge said that the reorganization "expedited administration within the court of appeals." This judge felt cases no longer simply sit on the docket waiting for attorneys to move them along. Rather, the team accepts responsibility for the cases assigned to it, and insures that they progress according to schedule.[88]

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88. How much of this reorganization can be attributed

This reorganization seems important, not only because overdue improvements in the operation of the court actually took place only after the circuit executive was appointed, but because the clerk and circuit executive were able to collaborate harmoniously on the reorganization of part of the court system. The reorganization of the clerk's office was intended to lead to higher productivity as well. It has freed several people to work with the circuit executive on other projects, and to provide a higher level of service generally. The clerk indicated, however, that the reorganized structure required two to three more people within the clerk's office.

Other judges commented that the clerk's office was not only better organized, but was actually functioning more effectively because of the influence of the circuit executive in insuring that the clerk's office recruited and hired fully qualified people. One felt

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to the circuit executive remains unclear. Many persons and organizations were involved (including the Federal Judicial Center). Yet it seems that the circuit executive was involved not only in formulating the plan for reorganization, but in obtaining additional personnel to effect the transition. According to the clerk, the circuit executive not only made suggestions but encouraged the clerk to go ahead with the change.

also that the establishment of a merit and incentive program developed by the circuit executive substantially improved job performance. He also felt that the circuit newsletter had a similar effect by providing visibility for court personnel and improving morale. Another judge indicated that the clerk's office was making better use of personnel, thus permitting the office to handle more cases more efficiently. It is especially notable, in view of the strained relations in some other circuits, that the Second Circuit clerk was willing to accept suggestions and recommendations of the circuit executive.

However, the role of the circuit executive in the Second Circuit has diminished the function and importance of the clerk to some degree. Although the clerk rejected the suggestion that the circuit executive was a "threat" to him, he did concede that the presence of the circuit executive tended to isolate him from the chief judge and the other judges of the court. He indicated that this was not a serious problem, as he simply had less business with the judges than in the past. In his view, the circuit executive was not performing functions that had in the past been performed by the

clerk. Rather, he was doing things that the clerk had not handled in the past, either because of lack of time and/or resources or because they were not part of his responsibility.[89] For example, the clerk had never served as secretary to the judicical council, nor was he responsible for building matters. These were handled by judges of the court, and are now the responsibility of the circuit executive.

Perhaps the most revealing development concerning the present role of the Second Circuit clerk involves the hiring of a "co-staff counsel" to handle essentially the duties of the senior staff attorneys elsewhere (this position was filled by the CAMP director). Since there was no position available, the office was reorganized and the vacant position of chief deputy clerk used for this purpose. In many large and well-run clerk's offices (both trial and appellate) the chief deputy clerk is responsible for the day-to-day operation of the office, and the clerk devotes his talents to improving its operation, developing new systems and techniques for handling work, justifying additional

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89. This arrangement closely resembles what Mr. Friesen anticipated in his testimony. See note 76, supra and accompanying text.

personnel when needed, and providing better equipment, new systems and improved training. For example, in the Northern District of Georgia, where the clerk's office is roughly the size of the office in the Second Circuit, the clerk of court is physically separated from the processing area. Thus he remains uninvolved in day-to-day activities, leaving those responsibilities to the chief deputy clerk and other supervisors. In the Second Circuit the circuit executive and not the clerk is recognized as the one who has provided general supervision of the clerk's office, and innovations including improving statistical reporting, new equipment, additional personnel, and new systems and techniques for handling appellate work. Thus it appears that that the clerk has been relegated to a role more like that of chief deputy clerk in charge of day-to-day operations,[90] a position now freed for another purpose.

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90. In the Seventh Circuit, the circuit executive was appointed relatively recently, so an attempt to describe his relationship to the clerk would be premature. However, our impression is that the clerk there, like the clerk in the Second Circuit, concentrates on the major day-to-day operations of the clerk's office, leaving major changes, improvements and innovations to the circuit executive. Several judges indicated that the circuit executive was to be a superior to the clerk, responsible for correcting any problems or weaknesses in the clerk's office, if necessary.

In general, this does not seem to us desirable, though in the Second Circuit the results have been excellent given the personnel involved.

The situation in the Tenth Circuit is perhaps even more clearly a line relationship. Except for the circuit clerks who were promoted to the position of circuit executive, the circuit executive for the Tenth Circuit is the only one who had recent experience as a clerk of a large federal court (the Central District of California); he was selected largely to tap this experience. At the time of his appointment there were serious personnel problems within the clerk's office and other supporting entities, particularly the staff attorneys' office. Thus, the circuit executive was selected to provide better management for the court of appeals, particularly with respect to personnel.

To facilitate this goal the judicial council of the Tenth Circuit ordered that the circuit executive be given the authority and responsibility for all of the items enumerated in section 332(e). Specifically, he was to exercise administrative control over the following "non-judicial activities of the court of appeals":

1. Plan, organize and administer the personnel system for all para-judicial personnel in the court of appeals with the exception of the judges' immediate staffs. . . .
2. Act as liaison officer between the court of appeals and the General Services Administration by coordinating all activities relating to the procurement, maintenance, and dispositon of furniture and furnishings of the court . . . .
3. Act as liaison officer between the Administrative Office and the General Services Administration for the court of appeals for all matters relevant to special needs for the court . . . .
4. Advise the clerk of the court in the maintenance of a modern accounting system for the receipt, custody, deposit and disbursement of all monies and valuables received by the clerk in his official capacity.

5. Conduct studies relative to the business and administration of the court of appeals and the district courts within the circuit and make recommendations to the chief judge and the council for improvements of same by revising procedures or the amendment or adoption of rules.
6. Collect, compile and analyze statistical data, and prepare reports on such data as may be directed by the chief judge or the circuit council . . . .
7. Attend all meetings of the circuit council and judicial conference of the circuit and act as secretary at such meetings.
8. Institute and maintain a forms management program . . . .
9. Assist the court in maintaining good public relations with all public and private bodies or groups having a reasonable interest in the administration of justice.

Only with respect to the "maintenance of a modern accounting system" does the council recognize the

clerk's responsibility, and provide that the circuit executive shall "advise" the clerk on these matters. In others, the circuit executive is assigned responsibilities the clerk's office had handled in the past. According to the clerk, when the circuit executive was appointed, the clerk's responsibilities were divided between the clerk and the circuit executive. Particularly important was the transfer of the staff attorneys' operation and the library from the clerk to the circuit executive. Also important, the circuit executive was made responsible for personnel matters, including hiring, firing, and transferring all clerk's office personnel.

Although the circuit executive was originally involved in the actual operation of the clerk's office he appears to have gradually withdrawn considerably, even with respect to personnel. A newly hired chief deputy clerk now serves as personnel officer for the court of appeals. Apparently the chief deputy clerk and management analyst recently have provided most of the recommendations and changes for the operation of the clerk's office, which, after preliminary approval by the clerk, must be presented to the circuit execu-

tive for final approval. Recruitment has largely been turned over to the chief deputy clerk and to the senior staff law clerk for personnel within those respective units.

One of the Tenth Circuit judges expressed concern over the line structure. He felt that the clerk has lost access to the chief judge and to the court by having to work through the circuit executive. He emphasized that the circuit executive should provide staff and managerial support to the clerk's office but should not be in a supervisory position over the clerk.

First Among Equals

In the Fifth Circuit, prior to the appointment of the circuit executive a committee of the Judicial Council undertook a study to determine the role and responsibility of the circuit executive, and define his relationship with existing court personnel, particularly the clerk of the court. The circuit executive was clearly defined as a "coordinate and equal branch" of the court of appeals. The organization chart for the Fifth Circuit Court of Appeals in the court's personnel manual shows the clerk and circuit executive each re-

porting directly to the chief judge, and from him to the judicial council. The librarian reports directly to the Library Committee and thus to the chief judge and circuit council. The personnel manual further defines the relationship of the various supporting units: "The head of each court support unit (staff attorneys, librarian and clerk) has the necessary degree of autonomy with respect to the operation of the unit's personnel that is essential for the proper performance of their respective duties and responsibilities. These duties and responsibiliites are imposed by statute, rules or regulations, and traditional custom, practice and directives of the chief judge, court or the judicial council."

The manual seems to suggest that the circuit executive shall serve as a coordinator of problems and proposals that go beyond the function and responsibilities of the particular unit, and shall present such matters to the chief judge, circuit council, or appropriate committee of the council. In practice, however, the clerk, staff attorney, librarian and chief deputy clerk have direct access to the chief judge and the judicial council. All attend judicial council meetings on re-

quest. There seems to be little need or practice of referring suggestions or proposals through the circuit exective.[91]

In spite of this clear division of duties, it does appear that the circuit executive has taken over certain responsibilities previously performed by the clerk, as directed by the court. As already mentioned, the circuit executive prepares the budget for the entire court of appeals staff. The circuit executive is also responsible for GSA liaison, security and allocation of building space, and compilation of data with respect to the work of the court of appeals. (Most data seem to be actually prepared by the chief deputy clerk). The circuit executive also initiated and supervised preparation of a personnel manual detailing such matters as recruitment, selection, placement, promotion, working hours, compensation, employee conduct and responsibility, benefits, services, leave, and

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91. As in the second circuit, the clerk's office of the Fifth Circuit underwent a significant reorganization soon after the circuit executive was appointed. Although the change was in the works before the executive arrived, his staff work on middle management (a crucial element of the change) was crucial to obtaining necessary positions and defining duties.

termination. He and a member of the clerk's staff jointly prepared the manual, and later referred it to the clerk for his comments and suggestions. The manual was then approved by the judicial council and distributed.

Because the organization in the Fifth Circuit assured the independence of the clerk and his staff, the high-level members of the clerk's office, although somewhat resentful of the circuit executive and the burdens he placed on their office, felt secure enough to suggest the circuit executive should be more involved in the management of the entire supporting staff. They specifically felt he should be coordinating all personnel matters[92] and serving as "spokesman" for the clerk and clerk's office personnel in dealing with the court and the Administrative Office. However, in spite of these suggestions, there were some complaints that the clerk and his staff had to work through the circuit executive with GSA even for minor building items like changing light bulbs. Unfortunate-

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92. At the present time each section (clerk, staff attorneys, etc.) handles all of its own personnel matters, such as insurance problems and leaves.

ly, GSA insists there be a single person to handle all building matters. As more staff are available perhaps the executive will be able to delegate this.

The Fifth Circuit executive also participates in the grievance procedure, which requires an employee who has a problem or complaint to report the problem first to the immediate supervisor, then to the head of the court support unit involved. If the employee is not satisfied with the decision rendered, he may then seek review by the circuit executive, who, after reviewing the matter, presents it if necessary to the judicial council for its action.

The Circuit Executive Committee (Fifth Circuit) gave serious thought to the problem of the potential overlap of the roles of circuit executive and clerk of court. It requested the clerk and deputy clerks to submit their views as to what duties should be assigned to the circuit executive, and the committee indicated that some of those recommendations were included in its report. The committee concluded "that appointment of a circuit executive had not placed the clerk in jeopardy of his automonous role within his assigned sphere, but rather added to the total court structure a trained

manager to relieve judges of time consuming, non-judicial duties which detract from their capabilities to perform judicial functions."

Other circuits also have adopted the "first among equals" approach. However, the relationship generally has resulted from unplanned development rather than intentional design. The two individuals, by mutual agreement (sometimes unspoken), have each sought out and discharged the tasks best suited to their skills and the court's needs, avoiding conflicts with each other. In the Eighth Circuit there was some support for the notion that the circuit executive should have broad supervisory authority over the other supporting staff (the clerk, librarian and staff attorneys). However, the general understanding seems to be that the circuit exective should not supervise either the clerk or the staff attorneys for the present. One judge emphasized that the circuit executive in the Eighth Circuit "will not be superior to the clerk."

According to another judge, the circuit executive is supposed to be responsible for the clerk and senior staff atorney, but he added that the circuit executive "leaves the clerk alone" and "leaves the senior staff

attorney alone."[93] The circuit executive's recent move from St. Louis, where the clerk's office and staff attorneys are located, to Kansas City, where the chief judge resides, was appropriate in part because he had few day-to-day responsibilities in St. Louis. However, at least one judge and the circuit executive felt that the circuit executive would eventually become responsible for the overall management and operation of the clerk's office. In view of a former judge, the circuit executive would handle the overall management and operation of the clerk's office, with the clerk in effect filling the present role of chief deputy by handling day-to-day matters, personnel, etc. He felt that the ideal relationship between the clerk and circuit executive would be a direct line of authority, but that such a scheme cannot be implemented at this time. As we have indicated, we feel that a line relationship would be unfortunate. Thus implemented, the Act would add little to the court except higher pay.

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93. The staff attorney operation was recently reorganized to provide more access to the individual judges for whom a staff attorney is working on a particular case. The new system reduces the need for supervision by either the senior staff attorney or the circuit executive.

The structure in the Fourth Circuit seems to parallel that of the Fifth. The chief judge emphasized that the clerk of the court of appeals is not subordinate to the circuit executive. He emphasized also that the clerk does not have to go through the circuit executive in dealing with the chief judge, the Administrative Office or the court, and that the circuit executive has no authority to interfere in the operation of the clerk's office. However, the circuit executive should feel free to make suggestions to the clerk for possible improvements in practices and procedure. This view was shared by several other judges.

However, one judge felt the functions of clerk and circuit executive should be clearly defined to eliminate potential as well as actual overlap. He mentioned, for example, that after the late Judge J. Braxton Craven, Jr.'s sudden death both the clerk and the circuit executive, without the knowledge of the other, sought to make arrangements for closing his office and assigning his cases.

Comprehensive Staff Support

While a number of circuit executives have been excluded from much direct involvement in the operation of

the clerk's office or other supporting entitities, many nevertheless felt that their role should be that of line supervisor, and expect to operate in that fashion in time. The D.C. Circuit executive is a notable exception: he emphasizes the staff or supportive nature of his position. As a result, both the clerk and the circuit executive maintain their independent responsibilities, despite the expectations of some members of the court that the circuit executive would serve as a "super clerk." Both the clerk and the circuit executive seem to work well together, and both attend judicial council meetings so that each can have direct access to the court regarding his area of responsibility. It is the clerk who serves as secretary to the council, freeing the circuit executive for fuller participation as needed.

One judge felt that the circuit executive "oversees the administration of the clerk's office" by developing personnel and other policies for clerk's office employees.[94] The circuit executive emphasized that

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94. This judge suggested that the clerk's office has operated more efficiently since the circuit executive was appointed. A new clerk was appointed about the same time as the circuit executive, so the specific impact of the circuit executive is uncertain.

he deliberately does not become involved in the day-to-day operation of the clerk's office and has avoided spending time on minor administrative and housekeeping matters that can be handled by the clerk's office or others. This reflects his understanding of good management practice and of the role the court expects of him. A written statement of activities of the circuit executive emphasizes that his relationship to the clerk is one of staff support rather than administrative direction. The circuit executive is charged with providing "guidance to the clerk of the court in property records and management, budgeting, and control of funds for furniture, etc."

Although much less formally defined, the relationship of the circuit executive and the clerk in the Sixth Circuit seems similar to that of the D.C. Circuit. As already mentioned, the circuit executive has attempted to minimize his involvement in the operation of the clerk's office. He has focused his efforts and attention on working with the district courts and general support for the chief judge and court of appeals in matters that fall between administrative "jurisdictions." He has thereby minimized the conflict with

the clerk of the court of appeals. It seems probable that the court would be likely to follow the recommendations of the circuit executive, should a disagreement arise between the clerk and the circuit executive as to some particular aspect of the operation of the court of appeals (including the clerk's office in particular). However, the advice would be more in the form of staff work for the court rather than administrative directive; the circuit executive is not the clerk's administrative superior.

Conclusions

The circuit executive can serve the court of appeals best in a strong staff capacity without line responsibilities. He should be recognized as the senior administrative official of the court. Thus he should be encouraged to take a leading role both in routine "organizational maintenance" matters not clearly assignable to one of the supporting operations, and in matters of policy (especially those that involve more than one supporting office). He should act through the court, the council, and committees, however, not simply as supervisor.

Other arrangements have worked well. A strong ar-

gument can be made for giving the circuit executive supervisory authority over the clerk's office, as well as such other entities as the library and staff attorneys. That arrangement forestalls the diminution of the circuit executive's role we find in the "first among equals" approach. It also strengthens the circuit executive's leadership in innovation because he has continuous access and responsibility in each support operation. These alternative approaches leave us unconvinced as a matter of policy, though we admit that the "staff" role we prefer is not the only one that can be made to work.

Although items 1 through 10 of section 332(e) are merely suggestive or discretionary, they do suggest that the circuit executive has direct administrative responsibility over the clerk's office. In that degree, these provisions of the Circuit Executive Act conflict with the conclusions we have reached. In our opinion, the clerk should exercise administrative control; the circuit executive does not need to administer the personnel system, the budget, the accounting system, the property control records, the collection, compilation and analysis of statistical data, and so on,

at least with respect to the operations of the court of appeals. If the circuit executive is to have time to serve the many important functions we have drawn in chapter I from the legislative history, assisting the court of appeals and its entities, as well as the district courts, in improving administration of justice within the circuit, he should be freed from the responsibility of direct supervision of the clerk's office.

CHAPTER IV

THE JUDICIAL PROCESS IN THE COURT OF APPEALS

Another major responsibility of the circuit executive--perhaps the most important one--is to help improve the judicial process.[95] This is not to suggest that the circuit executive can or should be involved in the decisional process by which each judge determines the proper disposition of an appeal or motion. The circuit executive's role is not to decide cases but to facilitate and expedite the decision-making process.

By common agreement there has been a large potential role here. Court of appeals judges have neither the time nor--in general--the specific training or experience to find technical and procedural possibilities, evaluate them, and refine them into proposals that address the court's specific needs and preferences. One circuit executive feels that most judges

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95. The term "judicial process," as used in this report, refers to all steps by which the court of appeals conducts its judicial business--primarily deciding motions, writs and appeals. Chapter I showed that Chief Justice Burger, Mr. Segal, and Senator Tydings, among others, gave special emphasis to this area in supporting the Act, as did the American Bar Association Report.

are too busy and some too "set in their ways" to try to plan for the future and develop new approaches and techniques for handling the work of the court.

Potential Role of the Circuit Executive

At a minimum, the circuit executive can assist the clerks and others in ensuring that the court has sufficient resources to maximize the effectiveness of each judge. Consistent with the staff role recommended in chapter III, the circuit executive should, for example, ensure that the clerk's office has sufficient well-trained and efficient personnel so that briefs, records, transcripts and other necessary papers are available when needed, so delays resulting from incomplete or lost records are avoided. The circuit executive may have a similar role in improving the assistance rendered by the court's library staff, ensuring not only that necessary materials are available but also that the professional staff can provide bibliographical and other supporting assistance. The circuit executive may also have a role to play in the recruitment and selection of staff law clerks for the court and he clearly is or should be responsible for ensuring

that they have the necessary physical resources to perform their work effectively.

While the clerk of the court of appeals should be responsible for seeing that his office utilizes the most efficient and effective methods and equipment, it is a clear purpose of the Act that the circuit executive should be able to provide advice and assistance. Furthermore, it is undoubtedly the circuit executive who should be in the best position to ensure that each judge and his staff have the most effective office equipment and techniques available. Probably he should assist in obtaining equipment as needed.

There is general agreement among judges that the circuit executive should be responsible for the judicial process to this point: providing the best possible support for judges and their support personnel. Whether the circuit executive's role extends beyond logistics is a question more in dispute. Some judges are concerned that the circuit executive might become too involved in "judicial business," apparently reflecting concern that the circuit executive might encroach on the decisional process. However, experience to date suggests that the circuit executive can assist

in improving the procedures for processing cases up to the court's decision, and the procedures for disseminating those decisions, without violating the integrity of the decisional process. Circuit executives can and should suggest procedures that would increase or speed the judicial product without lowering or reducing its quality.

For example, circuit executives have studied and made recommendations for more effective use of court personnel (staff attorneys), development of screening procedures, elimination of oral argument or written opinions, consolidation of related cases or cases involving similar issues, use of different court terms or schedules and experimentation with settlement schemes. At best, they have provided sufficient information about possible innovations that the judges have relied on staff work in determining if a proposal is suitable for adoption. The use or adoption of such innovations has been and remains a decision made only by the court.

An Overview

Most circuit executives have helped secure personal and physical resources for the court. However, relatively few have assumed--some have been prohibited from assuming--a major role in recommending or suggesting new procedures to the court for improving the efficiency of the appellate process. A substantial number of judges interviewed indicated that this has been their greatest disappointment with the Circuit Executive Act.

The circuit executives' contribution in this area is mixed. In only two circuits do the circuit executive and a majority of the judges of the court of appeals generally share the view that the circuit executive should have a major role in proposing specific improvements in the judicial process. One of these circuit executives emphasizes that his role is not simply to carry out the policies and ideas of the chief judge, the court and the council, but rather to be a creative force in the development of changes, improvements and innovations within the circuit. Most of the judges agree. There was one judge from this circuit who mentioned that some judges felt the circuit executive was

getting too involved in the management of the court, and several were critical of specific innovations the executive had proposed. However, most judges greatly valued the executive's achievements, and indicated that he was not reaching beyond his authority. Furthermore, it was apparent that both the chief judge and the judicial council have provided the circuit executive considerable freedom in making recommendations and suggestions for improving the judicial process, in a degree not present in most other circuits.

Another circuit also supports active and effective participation of the circuit executive in the management of judicial business.[96] For example, one judge there also emphasized that the court had modernized and improved its internal procedures during the six years he had been on the court, so that he is able to handle

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96. In one circuit the contribution of the circuit executive as an institution to the improvement of the judicial process is hard to assess because the incumbent had served as circuit executive for barely one year when this study was begun. However, prior to his appointment the present circuit executive (as administrative assistant to the chief judge and as senior law clerk to the court) was significantly involved in suggesting improvements and changes in the method of processing appeals. It appears that the court expects him to remain involved.

an increased caseload in less time. He feels that the court's improved procedures have allowed him to spend more time in deliberating and in disussing pending appeals with his colleagues. Thus, in his opinion, the judicial work product has improved both in quality and quantity.[97]

In the other eight circuits the circuit executive has been less involved in case management improvements. This is in spite of the fact that numerous judges and, in some cases, the circuit executive himself, expressed concern over his relatively modest role. In one circuit, the circuit executive is not a lawyer and the court seems to assume that he could not contribute in this area.[98] There and in at least four other cir-

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97. Specific improvments he referred to include the adoption of procedures for unpublished orders and brief opinions, and use of a screening procedure that eliminates ten percent of the cases from the oral argument schedule. Screening also reduces the length of argument in many of the argued cases. This has resulted in the ability of each panel to hear more cases per day (six), in addition to those decided without oral argument.

98. In that circuit the court recently hired a senior staff law clerk partly to handle certain law-related issues associated with the management of the court of appeals. Judges felt that the circuit executive was limited there, not being a lawyer. A district judge commented that the circuit executive should be a law-

cuits, the circuit executive has had little involvement in the operation of the court of appeals, leaving those responsibilities to the clerk.

In one circuit there is a pervasive concern that a circuit executive might improperly become involved in the court's judicial business. The concern does not seem to be limited to involvement in the decisional process (not a possibility), but seems to include most significant and sensitive areas of court operations. Although that circuit has a conscientious and diligent court executive, there seemed to be few policy areas of court operation in which he took the leading role the Act seems to contemplate.[99] He was, by contrast,

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yer, although the incumbent had been a "really good circuit executive." This judge referred to his belief that a very large percentage of appeals in the circuit (approximately one-third) had very little merit. He suggested that the circuit executive could have developed improved screening procedures for handling cases of little merit with minimal expenditure of judicial resources, had he been a lawyer. However, this judge also recognized that the circuit executive--even if a lawyer--could only contribute in this regard if he were encouraged by the court to do so.

99. For example, when the court decided to consider adopting the Second Circuit CAMP program (Civil Appeals Management Plan), a committee of judges was assigned that responsibility. Although the circuit executive offered to provide any needed assistance, one of the judges went to New York to interview Second Circuit

involved in several operational matters, such as arranging for visiting judges. In this circuit, the clerk and his chief deputy are more involved in improving local rules and developing new procedures for handling cases than the circuit executive.[100]

What seemed surprising was that virtually all circuit judges interviewed seemed well satisfied with this arrangement, while several district judges questioned the lack of involvement by the circuit executive in management of the court of appeals. One district judge commented that no one seemed to be doing any long-range planning or thinking about improving the administration of justice in the entire circuit. He indicated that this should be the responsibility of the circuit executive. Another felt that the circuit executive was

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judges involved in the program and to collect data concerning the success of the program. Then the chief deputy clerk--not the circuit executive--analyzed the data and reported his conclusions to the court. Thus the circuit executive was not substantially involved in evaluating a program which his counterpart in the second circuit had implemented. See pages 136-137 infra.

100. This is very likely appropriate; as the circuit executive said, he must use available talents to advantage. The arrangement is not what proponents of the Act would have anticipated, however.

being "wasted" on routine administrative matters and should be more involved in the management of the court. (Some of this concern seems misplaced, however. Pressed for examples, one of these judges listed several suggestions, nearly all of which were matters receiving the circuit executive's attention.)

The circuit executive seemed to share those concerns, indicating he would like to spend more time in long-range planning and less in "putting out brush fires." The clerk of the court of appeals felt that the circuit executive should be able to delegate his routine administrative duties to an assistant so he could spend time and thought on present and future problems facing the court.

A surprisingly large number of judges in the other circuits expressed similar concern, many suggesting that improving the judicial process was the circuit executive's biggest responsibility and his biggest failure. In one circuit a majority of the court seemed to share the view that the circuit did not need a court administrator or business manager, but needed someone who would be responsible for case management, making suggestions for changes in local rules and for improv-

ing internal operating procedures. One said that the circuit executive should be spending 75 percent of his time on case management. Another emphasized the circuit executive should not only be an administrator, but an innovator. He pointed out that a prior circuit executive had suggested several beneficial improvements in the court's internal operations.[101] Another judge suggested that the circuit executive should be analyzing the caseflow and workload of the court of appeals in order to identify particular problems and recommend solutions. He emphasized that whatever improvements and innovations had occurred in the circuit were the product of thought and suggestions from the judges and the clerk, rather than the circuit executive. Another judge concluded that improvements in the court of appeals had come from several hardworking judges who had improved their own procedures for handling cases. According to these judges, the significant changes came

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101. These included a uniform format for court opinions, as well as a system, including procuring new typewriters, so all opinions would be uniform in appearance and printing opinions would no longer be necessary. It should be noted, however, that the court had been critical of the large number and variety of suggestions the previous circuit executive had made.

about without major contribution from the circuit executive.[102]

Similar complaints were registered in other circuits. In one circuit where the circuit executive, as supervisor of the staff attorneys, has been involved in the operation of the court's screening program, several judges felt he still should be doing more to improve the operation of the court of appeals. One indicated the circuit executive should be suggesting utilization of new equipment and recommending changes in local rules and in internal procedures for handling cases (in several instances, he has done these things). Another voiced the hope that in the future the circuit executive would become more involved in the development of methods to assist the court in reducing its backlog. Still another judge felt that the circuit executive should conduct studies designed to expedite the pro-

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102. For example, one judge commented that the court had received a great deal more assistance from the clerk than from the circuit executive in developing an appeals expediting system. The same was said to be true with respect to the court's screening procedures. Improvements in the index of court opinions were made by the librarian and senior staff attorney without support or assistance from the circuit executive.

cessing of appeals, but he noted that ideas and suggestions for such improvements were coming from staff attorneys rather than from the circuit executive.[103] The most outspoken critic of this circuit executive felt that too little had been done by the circuit executive in developing procedures and techniques for handling the workload of the court. He felt that the backlog could have been cleared up with proper planning, by developing new systems for using visiting judges, and better docket control. Finally, a judge suggested that the circuit executive could have made the court better aware of the practices, procedures and techniques being utilized in other circuits. He conceded that the circuit executive had made reports on projects in other circuits when specifically requested to do so by the court or council but this judge suggested that the circuit executive should be better informed of developments in other circuits. Without request by the court,

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103. This judge emphasized that the staff attorneys should be primarily involved in processing and screening appeals. The circuit executive, not the staff attorneys, should be responsible for research projects.

he should bring developments to the attention of the court.[104]

Similar views were expressed by judges in other circuits. One indicated that several judges had been studying the possibility of creating a divisional office, but that the circuit executive should have considered the possibility, done a preliminary study, and referred the problem--with his report and recommendations--to the judicial council. This judge felt the executive was often passive or even negative concerning possible innovation, especially in matters of equipment application. Not only did the circuit executive rarely develop new proposals, he often responded to proposals of the judges only with problems or obstacles, rarely with solutions to them. Another judge also commented that the circuit executive had not been enough of an innovator, and had made few suggestions for improving the operation of the court of appeals. According to another judge, although the circuit executive should

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104. The CAMP plan was mentioned as an example of a development that the circuit executive should have made the court aware of, regularly reporting on the development and success of the program.

not be directly involved in the routine operations of the clerk's office or the staff attorney operations, he should be making suggestions for improvements in the operation of those units as well.

Judges mentioned specific problems which would have benefited from circuit executive attention. One district judge mentioned that, in his view, the court did not have an effective way of scheduling cases, particularly emergency matters. He also mentioned the existence of substantial disparity in the caseloads and opinion production of individual judges on the court.

However, as mentioned previously, it is clear in some circuits that the circuit executive has made a substantial impact in improving the administration of justice, directly reducing delay and court congestion. In the Second Circuit one judge indicated that in spite of a fifty percent increase in the workload, the court had remained current primarily because of procedures developed and recommended by the circuit executive. In the District of Columbia Circuit the circuit executive was able to predict an increase in filings, and persuaded the court to increase the number of appeals it heard per day (from three to four) and to employ ad-

ditional sitting panels per year. Further, the circuit executive (not a committee of judges) studied the use of staff law clerks in other circuits and reported observations and recommendations to the court. The Seventh Circuit executive has developed and proposed many of the procedural refinements implemented there in recent years, many of them in one of his previous capacities, before he was appointed circuit executive.

Limiting Factors

The circuit executives themselves cannot be blamed entirely for the disappointment in this area.[105] In one case the circuit executive stands willing and able to study and recommend improved procedures for dispatching cases. The court, however, has made it clear as a matter of policy that it is not interested in most innovations, new procedures or new equipment proposed, and prefers to proceed as it has in the past. The court is aware, however, that filings and backlog con-

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105. It must be remembered that the Board of Certification stressed the need for "business managers" and seemed to discount the relevance of experience in court operations, the subject of this chapter. Also, few circuit executives were given an adequate "job description" when they were appointed: few knew what was expected of them, especially in this area.

tinue to mount; the executive has demonstrated this precisely, and projected the likely future consequences. Even where other circuit executives have been involved there is a tendency to quickly criticize suggestions that were not adopted, or if adopted, were not successful. Some of the criticism already quoted may be unwarranted, in fact. Sometimes judges were unaware of circuit executive action on issues they mentioned. Sometimes also, judges seemed to blame the circuit executive for uncontrollable problems that beset their courts. Still, much of the criticism is supported by parallel comments of others, or by our observation.

For a circuit executive to be an effective "change agent" in judicial process matters, there must be a fortunate match of an aggressive and knowledgeable executive with a receptive court. An innovative circuit executive, trained and experienced in the judicial process and aware of the problems of an appellate court, with sufficient insight and experience to recomend workable solutions to judicial problems, can achieve little unless his court is hospitable to such suggestions and willing to experiment and implement them.

Finally, the role of the clerk is important in many of the circuits where the circuit executive has played a minimal role in improving the operation of the court. The clerk had often been providing studies, suggestions and recommendations for improvement. For example, in the Fourth Circuit, the circuit executive has not been significantly involved in developing new procedures for handling the court's judicial business. However, as clerk prior to his appointment as circuit executive he developed one of the early staff-supported screening procedures. A similar procedure was suggested and implemented by a former clerk of the Tenth Circuit, long before the Circuit Executive Act. And in the First Circuit, where no circuit executive has been appointed, the clerk has suggested and implemented innovative procedures for assisting the court in maintaining its calendar. Thus, in some circuits the circuit executive confronts a hostile climate for suggestions or recommendations. In others, the clerk has been the innovator.

Specific Contributions of the Circuit Executive

Improved Staff Support

Several circuit executives have made important contributions to court of appeals staffing. This can

be done in a fashion consistent with an effort to avoid interfering in the routine operation of supporting offices. On behalf of the court the executive can conduct the more burdensome aspects of recruitment for senior positions. He can also devise and propose court-wide personnel policies.

In the D.C. Circuit, the circuit executive has handled the recruitment and screening of, and participated in the selection of the senior staff attorney, the clerk, the chief deputy clerk, and the librarian. The Second Circuit executive, in addition to recommending a clerk's office reorganization that provided for better and more efficient staff support, has suggested and implemented new recruiting, training and incentive procedures. Several circuit executives have been responsible for greatly improving library facilities and service.[106]

The relationship between the circuit executive and the staff attorneys is far from uniform among circuits. While all circuit executives provide some degree of "housekeeping" support for the staff attorneys and may

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106. See chapter II, supra, at 47-50.

also handle their personnel matters (appointment paperwork, vacation, leave, etc.) in only two circuits does the circuit executive supervise, direct or oversee either the hiring or the work of the staff attorneys. Most judges think the latter unwise. One second circuit judge--an ardent supporter of the work and accomplishments of the circuit executive--expressed concern about the narrow line separating judicial from administrative responsibilities. He expressed the view that staff attorneys should neither be hired by nor report to the circuit executive.[107] He and others emphasize that the staff attorneys should be hired by and report directly to the court because supervision of their work is primarily a judicial matter. Also, under the direct supervision of the circuit executive the staff attorneys might get too involved in his projects, thereby reducing their effectiveness for the court. Finally, the best qualified candidates can only be attracted if a meaningful personal relationship exists between the staff law clerks and the judges of the court.

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107. In most circuits, the main purpose of the new position of Senior Staff Attorney was to supervise staff attorneys and review their work.

Other judges emphasized that it is more appropriate for the staff attorneys to be supervised by the clerk than by the circuit executive in view of the necessary close relationship between the clerk's office and the staff attorneys, with both dealing with the processing of appeals through the court. However, in one circuit the clerk is not particularly interested in supervising the work of the staff attorneys; that responsibility naturally falls on the circuit executive.[108] In at least one, where the circuit executive had been directed to stay out of the operation of the staff attorneys, the staff attorneys had been given little direction; some sort of regular control and supervision was clearly needed.[109] Supervision by the circuit executive may be valuable for other reasons also. A former circuit executive emphasized that the

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108. In the only circuit in which the circuit executive has direct responsibility over the staff attorneys, several judges expressed concern that the staff attorneys were becoming involved in research and other projects of the circuit executive, and were not devoting sufficient time and energy to assisting the court in processing cases.

109. This problem may have been alleviated by the recent employment of a senior staff attorney.

lack of direct supervisory authority over the court supporting personnel, including the clerk and staff attorneys, had reduced his effectiveness significantly.

Finally, most circuit executives have been instrumental in obtaining more personnel for their courts--both judges and supporting personnel. The circuit executive for the Third Circuit was able to obtain Administrative Office approval for the addition of several deputy clerks to the clerk's office. The Fourth Circuit executive obtained an increase in staff law clerks. Especially impressive were the efforts of the D.C. Circuit executive to justify additional judges for the court of appeals. He demonstrated to the satisfaction of the Judicial Conference and Congress that the appeals handled by that court were, on the average, more difficult than those in other circuits. Accordingly,the court obtained judgeships for which it could not have shown justification.

Improving Local Rules and Procedures

Several circuit executives have made significant contributions to the improvement of local rules and practices.[110] But only in perhaps two circuits have

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110. For example, the circuit executive and the clerk

the circuit executives been extensively involved in developing new rules and procedures governing both practice before the court of appeals and its internal operation. The Second Circuit executive has been involved in such matters. These include:

(1) The preparation of a manual for judges' law clerks.

(2) A criminal appeals expediting plan.

(3) Changes and improvements dealing with the filing of records and briefs.

4) A new procedure with associated local rules relating to motion practice before the court of appeals.[111]

The circuit executive also encouraged the court to establish the position of "motions clerk." This staff

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of the D.C. Circuit court, working together, proposed rules to expedite the processing of appeals. In the same circuit, the circuit executive and the chief staff law clerk have developed procedures for reviewing appeals prior to calendaring so that similar cases can be clustered in groups for oral argument.

111. These forms require the moving party to include with each motion the name and address of opposing counsel, whether or not opposition is expected, whether oral argument has been requested and a brief summary of the nature of the suit, the requested relief and facts and arguments in support of the motion.

law clerk assists on all motions, thereby freeing the judges' personal law clerks to concentrate on submitted appeals. The system also has provided better staff support on pending motions. The circuit executive has also contributed to the procedure for appointing counsel for indigent appellants.[112]

One of the major accomplishments of the circuit executive in this area has been his role in the reorganization of the clerk's office. According to several judges, this expedited the processing of paper work through the clerk's office and reduced lost and misplaced files. At the same time the circuit executive also encouraged implementation of a new method for processing briefs, records and other supporting materials. Finally, the circuit executive has provided comments

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112. Each district court has its own list or panel of eligible attorneys, and the court of appeals has a separate panel. However, there is a judicial council rule that requires the same attorney to handle the appeal who handled the trial unless he is unable to do so. But some attorneys on the district court panel are not on the court of appeals' panel. The circuit executive attempted to resolve the problem by encouraging the district courts to adopt procedures whereby attorneys would not be placed on their panels unless they were qualified to serve on the appellate panel as well. However, this plan was rejected.

and suggestions on proposed changes to the Federal Rules of Appellate Procedure.[113]

The Second Circuit executive also proposed a new system for expediting criminal appeals within the court of appeals. The recommendation included substantial justification, beginning with a discussion of present problems, and problems which could or would be likely to exist in the future. The circuit executive's proposed solution included proposed changes or modifications to local rules that would be necessary to carry out the recommendation. Thus, the court was provided all the materials it needed to make a decision, and then to implement the decision.[114]

Other circuit executives have made some similar contributions.[115] Several have drafted or initiated

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113. The circuit executives and clerks generally have been conspicuous by their absence from Judicial Conference committees dealing with trial and appellate practice, and court administration and management in general. The same has been true of Federal Judicial Center programs, other than those directed to circuit executives, clerks and other supporting personnel. See chapter VII, infra.

114. The circuit executive for the Ninth Circuit also was responsible for developing that circuit's plan for expediting criminal appeals.

115. In viewing the substantial accomplishments of the Second Circuit executive it must be remembered that he

descriptions of the court's internal operating procedures. The Tenth Circuit executive was instrumental in preparation of a Practitioner's Guide. This volume is undoubtedly of great value, especially to young practitioners or those with little or no federal trial or appellate experience. However, it apparently was prepared by the staff attorneys at some loss in their effectiveness in providing screening and other support to the judges of the court of appeals. But in another circuit, standards for internal operation were prepared, drafted and promulgated by a committee of judges without much input from the circuit executive. He was involved only in publishing and disseminating these materials.

The circuit executive's role in screening programs usually corresponds to the circuit executive's relationship with the staff attorneys. For example, in the Eighth Circuit, where the circuit executive had little contact with the staff attorneys, the screening procedures were developed by a committee of the court and

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has an effective staff far larger than any other. See note 57, supra.

implemented by the clerk. In the Tenth Circuit they are administered by the circuit executive.[116]

The circuit executive for the Second Circuit has been extensively involved in that court's Civil Appeals Management Plan (CAMP). Although the concept behind CAMP came from the chief judge, the circuit executive was involved in the development, refinement, and implementation of the project from the start, as well as its evaluation. The circuit executive prepared a memo recommending adoption of the chief judge's proposal to use a prehearing conference, as provided for in rule 33 of the Federal Rules of Appellate Procedure. The purpose would be to explore the possibility of bringing about a settlement and voluntary dismissal of some of the cases before the court. It was further thought, even if settlement was not achieved, that the prehearing conference could facilitate use of an abbreviated transcript and record by narrowing and focusing the issues. Perhaps also, shorter briefs and reduced oral

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116. As mentioned previously, before his appointment the present circuit executive for the Fourth Circuit (as clerk of the court of appeals) developed and assisted the court in implementing one of the nation's first screening procedures, utilizing staff law clerks.

argument would be possible. Furthermore, these conferences could identify appeals which should be expedited. Typically, the circuit executive's report and proposal are complete with draft procedures and rules, and an estimate of the cost, framed in terms of time, additional staff, and space.

While the Judicial Center report[117] and some observers from other circuits have questioned in some degree the claimed success of CAMP, these criticisms are irrelevant to the present purpose. CAMP is a valuable and significant experiment in improving the administration of justice, and in reducing costs and delay. Similarly, the Second Circuit executive's important role in this and other experimental programs is significant beyond the degree of success of the individual program; it demonstrates that the circuit executive can be a meaningful force in seeking improvement of justice within the circuit.

The Seventh Circuit executive has had a substantial role in procedural innovations, and made signifi-

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117. J. Goldman, An Evaluation of the Civil Appeals Management Plan: An Experiment in Judicial Administration (Federal Judicial Center 1977).

cant contributions also to the recent revision of the Federal Rules of Appellate Procedure (working with the senior staff attorney and the clerk). He developed the system of "docketing conferences" in all criminal and in many civil cases. The main functions of the docketing conference (which may be conducted by telephone if counsel are out of town) are to ensure that all administrative matters are in order, that the record will be ready for the appeal, and to inform the circuit executive and staff of any special problems. The conferences were held by the executive until early 1977. The senior staff attorney, appointed then, conducts the conferences now. He prepares a schedule for briefing, reviews the appeal for jurisdictional problems, and determines if there are related appeals that should be consolidated. Where there are large multi-defendant cases, he attempts to obtain agreement as to the selection of lead counsel to be responsible for the principal briefing and oral argument. (Other counsel provide supplementary briefs and argument). The circuit executive has developed and proposed many other innovations involving most aspects of the appellate process.

Scheduling

In most United States district courts much of the scheduling of court activities is handled, not by the judge himself, but by supporting staff (usually the courtroom deputy clerk).[118] Judges have been more involved in court of appeals scheduling. Each court determines, largely on the basis of past experience, how many court days will be scheduled per year and how many cases will be heard per day. Circuit judges, especially the chief judge, have generally undertaken one calendaring function or another to assign cases or judges to the scheduled court days.

In three circuits (D.C., Second and Third) the circuit executive has attempted, with a large measure of success, to guide this schedule by projecting the number of filings and appeals which will occur, and their effect.[119] Several judges commented that the

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118. In a few districts this activity is handled by the judge's secretary or by one of his law clerks. See S. Flanders, Case Management and Court Management in United States District Courts (Federal Judicial Center 1977), esp. at 20-21, 66-67.

119. In another circuit it was anticipated that collecting data on appellate caseloads would be a principal responsibility of the circuit executive. However, the chief deputy clerk seems to have remained responsible for collecting and disseminating data on judicial business in the court of appeals.

biggest contribution made by the circuit executive was collection and dissemination of data on the work and "production" of the court of appeals. The circuit executive collects needed data from the Administrative Office and the clerk's office, and summarizes and analyzes it for the chief judge. For example, in a recent memorandum, a circuit executive noted that extraordinarily high criminal filings in the past month had been due to a large number of consolidated cases, and pointed out that these large consolidated cases carry a substantially longer mean disposition time. The circuit executive concluded that the presence of these cases will prevent the court from showing a further improvement in its median time for disposition of criminal appeals.

The principal purpose in collecting data on the number and types of appeals being filed is to be able to project the number of court terms per year and hearings per day necessary to handle the anticipated filings. For example, in the Second Circuit the court attempts to establish the optimum number of cases it should have on its docket at the end of a particular term. Thus, as the number of filings fluctuates it

becomes necessary to adjust the number of sittings in order to insure that the pending caseload remains on target.

In several circuits the circuit executive also provides a monthly report to the chief judge showing the number of cases docketed, terminated and pending at the end of the month, and the number pending at the end of the prior month and one year before. In addition, the report reflects the number of cases under submission, the number of decisions rendered, and the number of cases awaiting decision.

Collection and analysis of data on court of appeals filings, dispositions and pending cases was one of the principal tasks assigned the circuit executive for the D.C. Circuit. He maintains tables and charts that reflect a breakdown of cases filed and disposed of per month by various categories, with comparisons to prior months and years. By maintaining these data the circuit executive is better able to predict the impact of new legislation. This is particularly important in the D.C. Circuit; new legislation frequently involves review primarily or exclusively by this court of appeals. These data allow the circuit executive to pre-

dict more accurately the impact of legislation on the court and to convert this increased workload into a need for additional judgeships.[120]

Scheduling of appellate work involves three separate and distinct elements that traditionally have been handled, at least in most circuits, by three different persons. The court must first determine how many days per year the court will hear oral argument, and the number of cases that will be heard or submitted per day. This decision is generally made by the court or, occasionally, by the chief judge. Next, decisions must be made as to when and where the court will sit, and which judges will compose the various panels. This function has been traditionally handled by the chief judge (or, in some circuits, by an assigned judge or committee of judges). The final step is to assign cases to particular panels. This task is almost always handled by the clerk or his deputy. In some circuits, case assignments are made on a more or less random basis. In other circuits, an effort is made to place similar cases on the same panel, or to insure that the

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120. See page 125, supra.

total burden of each day's assignments is relatively constant, or both.

It has generally been felt that the same person should not prepare the assignments of individual judges to the panels and the assignment of cases to the panels, to avoid any appearance that the court or chief judge can control decisions by placing certain cases or kinds of cases before certain judges. For this reason, in most courts the chief judge has determined which three judges will sit on a given panel and the clerk makes assignments of cases to a panel without knowing what judges will hear them.

In at least five circuits (Third, Fifth, Sixth, Seventh and Ninth) the circuit executive is now involved in the process, usually by assuming the chief judge's former duty to assign specific judges to particular panels. While it might be thought that such a task is too routine or mechanical an operation to be properly assigned to the circuit executive, it appears appropriate to us. Since it is desirable to separate the function of assigning cases from the assignment of judges, and since the former must be handled by the clerk of the court, it seems logical to assign to the

circuit executive the administrative responsibility of assigning judges to panels. Certainly this is preferable to leaving this time-consuming task to the chief judge. The procedure seems to operate effectively.[121] In only one circuit does the clerk handle the scheduling of terms and panels; the chief judge makes panel assignments.

The assignment of cases to panels is one of the major responsibilities of the circuit executive for the Seventh Circuit. For the past five or six years the circuit executive has been responsible for calendaring cases for oral arguments. This function began long before his appointment as circuit executive, when he served as administrative assistant to the chief judge. The circuit executive keeps track of the cases as they progress through the clerk's office, and reads or

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121. In one circuit a committee of the court nominally handles the setting of terms and the assignment of judges to panels, but the work is done by the circuit executive subject to the routine approval of the committee. The court established this arrangement in order to insulate the circuit executive from complaints and criticisms by members of the court who might feel that their assignments were somehow unfair. To us it seems unfortunate that it is necessary to shelter the circuit executive in this way when he is carrying out an important but clearly administrative responsibility.

reviews all briefs filed in every appeal. Until recently he held all "docketing conferences" himself. A particular effort is made in the Seventh Circuit to avoid placing related cases or cases presenting similar issues before different panels. Whoever does this must have some understanding of the nature of each pending appeal.

The Seventh Circuit executive is also responsible for screening recommendations, i.e., whether the case will be disposed of without oral argument, with limited oral argument or after full argument. This also requires him to read the briefs in each case.[122] He is responsible also for both assigning cases to individual panels and assigning judges to those panels. He uses a strictly random basis for assigning judges to panels.

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122. Reviewing, even perfunctorily, each brief filed in the Seventh Circuit is a major task for one individual. In view of the fact that only a small percentage of cases are decided without argument, the major screening decision is the amount of time the case will be permitted for oral argument. Since oral argument (even when the full time is permitted in all cases) has been shown to take less than ten percent of a circuit judge's case-related time, it seems that this effort can save relatively little judge time at a great expenditure of the time of the circuit executive. The circuit executive feels that this reading is useful to keep abreast of administrative issues throughout the circuit.

The circuit executive is convinced that his time and effort are well spent due to the economy of having a single panel deal with a particular legal issue. Otherwise a number of panels would deal with the same issue and have to exchange proposed opinions to avoid conflicts. Perhaps the most beneficial and important aspect is the avoidance of inconsistent panel decisions.

It is anticipated that much of this responsibility will gradually be assigned to the senior staff attorney. We strongly favor this; the circuit executive's job is to design procedural innovations, but not to carry permanent operational responsibilities for them.

The clustering or consolidation of similar cases before the same panel of the court of appeals is under development in several circuits, notably the D.C. and Ninth Circuits. In the D.C. Circuit the circuit executive and senior staff attorney are developing procedures and recommendations for reviewing the cases and clustering them in an appropriate fashion. The circuit executive will not become involved in the day-to-day review and analysis of these cases. The Ninth Circuit

is using staff attorneys and an FJC computer application to do this.[123]

A final area relating to the scheduling of terms of court is use of visiting judges.[124] In nearly half of the circuits the circuit executive identifies the terms of court for which visiting judges will be needed. The circuit executive then, either personally or through the Judicial Conference Committee on Inter-Circuit Assignments, contacts possible visiting judges to determine their availability. In these circuits, and in several others, the circuit executive handles the actual assignment of visiting judges to particular panels and provides for their administrative support.

New Technology

In most circuits the circuit executive has been involved in the evaluation and implementation of equipment and devices to enhance the productivity of the court. For example, in several circuits the circuit executive directed the installation, training,

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123. See M. Leavitt, CALEN 9: A Calendaring and Assignment System for Courts of Appeals (Federal Judicial Center 1978).

124. See pages 55-58, supra.

testing and evaluation of LEXIS in cooperation with the Federal Judicial Center.[125] However, in another circuit WESTLAW was evaluated, not by the circuit executive, but by the senior staff attorney (as the user, he is a logical choice). In the Ninth Circuit the circuit executive, in cooperation with the Administrative Office, initiated computerized printing of opinions. In the Tenth Circuit, the circuit executive evaluated word processing equipment, use of facsimile transmission devices, and established a system for printing opinions and forms for both the court of appeals and district courts. The Third Circuit executive has initiated the test there of computerized word processing and transmission, also in cooperation with the Federal Judicial Center. The Second Circuit executive instituted a system to microfiche court of appeals briefs and records, as well as other innovations mentioned elsewhere.

The Appellate Information Management System (AIMS), a computer software system now under development by the Federal Judicial Center, results largely

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125. See A. Sager, An Evaluation of Computer Assisted Legal Research Systems for Federal Court Application (Federal Judicial Center 1977).

from circuit executive initiative. It has also been the circuit executives who have managed the elaborate systems work necessary to develop a common "glossary," to standardize docket entries in the degree necessary, and to coordinate the needs of the circuits. It is clear that this project would not be in development without circuit executive initiative.

Conclusions

We concluded in the preceding chapter that some circuit executives have been too much involved in the operation of courts of appeals. By contrast, here we indicate they have generally been too little involved. There is another, corresponding difference: the preceding chapter deals with matters that have always been staff responsibilities, while the subject here is the more novel function of improving the judicial process itself. It is easier and yet often less essential for the circuit executive to have an impact on the clerk's office. To assist the judges to improve the judicial process, however, the circuit executive must often seem to intrude on judicial prerogatives, and must inquire into and act on highly sensitive matters of policy and of judges' own work patterns.

Still, improving the judicial process has been and remains a very important field for exercise of circuit executive talents and experience. Those who have had a major impact have shown that much can be done. Familiarity with the issues and setting have proved important in this area; legal training and previous experience in the judiciary have been important elemerts in the success of the more effective circuit executives. Important also is continuous work with all courts of appeals offices, including the clerk's office. A circuit executive who is isolated cannot make knowledgeable contributions to improving the judicial process.

It is possible that many judges overstated the failings of their circuit executive, though they may also have understated them. It may be that judges blamed circuit executives, in our meetings, for ills of the court that had been beyond anyone's control.[126] Often the judges were unaware of the executive's efforts. However, most circuits clearly could use their executives to better advantage. Clearly also, most

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126. We visited the courts near the end of an eight-year period of steadily increasing caseload, but no increase in judges.

executives have not taken full advantage of available opportunities to help improve the judicial process.

CHAPTER V

ASSISTANCE TO THE DISTRICT COURTS

Neither the statute nor its legislative history gives a clear indication of the role of the circuit executive in dealing with the district courts.[127] The legislative history contains numerous references to trial court problems, and expressions of hope that a new court executive would provide assistance. However, it must be remembered that much of the testimony and other support for the bill related to the original proposal to create executives for both the court of appeals and the larger metropolitan courts. The act itself heavily emphasizes the role of the circuit executive in dealing with the court of appeals. None of the suggested responsibilities involve the district courts only. The ones that refer to "courts within the cir-

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127. It is clear, however, that the circuit executive was intended to serve as staff to the judicial council and to enhance its supervisory role with respect to the district courts. (Chapter VI) The subject of this chapter, related but in some degree distinct, is the function as advisor or consultant to the district courts--judges, clerks, and others--in dealing with their problems.

cuit" only involve studies, meetings, and reports.[128]

However, there seems to be considerable expectation that the circuit executive was intended to be just that--the executive for the entire circuit. Several of the executives see their responsibility as embracing the whole circuit, as do several circuit chief judges and other judges. Yet the prevailing view is that most circuit executives have become "circuit court of appeals executives" or even "super law clerks to the chief judge of the court of appeals," as two district judges described them.

Here again the problem seems to be that there was little planning or definition of the job. Even where there was a determination that the circuit executive should provide assistance to the district courts, this fact was seldom effectively communicated to the dis-

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128. The first three suggested responsibilities (28 U.S.C. § 332(e)(1-3) refer to the court of appeals only. Subsections (4) and (5) may have been intended that way also; in any case the responsibilities mentioned--accounting, property control, space management--are not major circuit executive matters. Subsections (6-10) involve studies, meetings, and reports. While these may be critically important, epecially when conducted at council request in support of an imminent council action, they are not the primary concern of this chapter.

trict courts.[129] The chief exception is the Fifth Circuit, where the Circuit Executive Committee identified several areas where it expected the circuit executive to represent the entire circuit:

1. developing work measure standards for supporting personnel.
2. assisting in justifying the need for additional supporting personnel for all courts within the circuit, and in obtaining authorization for such personnel.
3. determining the training needs for supporting personnel of all courts within the circuit, and arranging with the Federal Judicial Center for appropriate programs.
4. developing standards and methods for determining the need and justifying additional equipment, supplies, furniture and furnishings in all courts within the cir-

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129. It must be remembered that the circuit executive, like the magistrate, was not an office the district courts sought. Rather, it was imposed by initiative elsewhere. Also, the executive's identification with the judicial council is an additional obstacle to a role as a resource for district courts.

cuit, and coordinating these with the Administrative Office and General Services Administration.

5. investigating and evaluating the use of automated data processing systems and procedures for all courts within the circuit.
6. representing the circuit as its liaison to the Administrative Office, GSA, state courts in the circuit, the Marshal's Service, state and local bar associations and private civic groups interested in the work of the courts.

The Committee recognized that the administration of each court was the responsibility of the judges of that district and the chief judge, but anticipated that the circuit executive would provide "some assistance" to the district courts by conducting studies and providing standards, procedures and systems that would be useful to the district courts. On two occasions the chief judge introduced the newly appointed circuit executive at judicial conferences and emphasized the council's commitment to this understanding of the job.

The Tenth Circuit also perceived the circuit executive from the beginning as someone who could advise and assist the district courts. The circuit executive for the Tenth Circuit is the former clerk of the Central District of California: prior to that he served in an administrative capacity with the Los Angeles County Superior Court. He was selected as circuit executive, in part, because the judicial council felt that his background and experience would allow him to be of significant assistance to the district courts. Shortly after his appointment the chief judge introduced him at a judicial conference, emphasizing his responsibilities throughout the circuit.

However, in over half of the circuits the district judges and court clerks generally said that the circuit executive has been of little or no assistance. In general they indicated that they perceived the circuit executive as significantly involved in arrangements for the annual judicial conference, receive statistical reports and other information from him from time to time, but otherwise have very little contact with him. Most gave no examples of having sought assistance from the circuit executive. Generally they said they really did

not need his help.[130] Surprisingly, in two circuits both judges and clerks observed that the circuit executive never took the time to drop into their chambers or offices to see if they had any problems for which he could be of assistance, although he was frequently in their building in connection with court of appeals hearings or other business.

In most circuits there were occasional instances of help. For example, one judge in a metropolitan district mentioned that the circuit executive had assisted the court's magistrate committee in preparing statistics and supporting materials to justify additional magistrate positions, and had helped the court obtain

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130. Typical are the comments of one experienced metropolitan district court clerk, who indicated that he had received no real assistance or support from the circuit executive when he sought a swing court reporter. This clerk indicated also that he neither sought nor received help in justifying additional judgeships for his court nor in his dealings with GSA. He concluded that the establishment of the position of circuit executive had been "nice for the chief judge of the circuit" but it had little overall effect on the rest of the circuit.

An urban chief judge specifically mentioned that the circuit executive had not been of any assistance in gathering data and other supporting materials to justify the district's request for additional judgeships. He gave no indication that he had requested such help, however.

additional and more productive Xerox machines. He also mentioned that the circuit executive had helped the district court obtain authorization from the Administrative Office for additional personnel. The chief judge of the same district indicated that the circuit executive had been helpful when called upon, but that he had not sought his assistance often. He did mention that the circuit executive had been of some help in getting a swing reporter for the court. In another circuit one judge from a small rural district indicated that the circuit executive had helped resolve the question of where a new judgeship would be located, and arranged for accommodations for the judge. Also mentioned was that the circuit executive had assisted in arrangements for establishing a public defender's office. However, in the same circuit the clerk, chief judge and other judges of a metropolitan court indicated that the circuit executive had not helped them at all.

In sharp contrast, there were at least two circuits that differed markedly from the above. Most district judges and clerks interviewed in the Sixth Circuit indicated that the circuit executive had been

of real assistance to them. One circuit judge considered this an "unexpected benefit," as the circuit judges perceived the position as serving the court of appeals primarily. The circuit executive has made a specific and apparently successful effort to develop a good working relationship with clerks and judges in the circuit. (By his admission, he has been less successful in assisting the other judicial personnel such as bankruptcy judges and magistrates.) According to one circuit judge, the circuit executive has "done a fantastic job as liaison with the district judges." Another pointed out that this liaison between trial and appellate courts did not exist before. It was also pointed out, in contrast with the situation in other circuits, that the circuit executive was not viewed by the district judges or clerks as a "spy" or "arm" of either the chief judge of the court of appeals or the judicial council. Rather, he is considered someone who has the interest and ability to assist in resolving problems.

Comments from district judges were almost equally supportive. They mentioned, among other matters, that the circuit executive had worked with the clerks of the

district courts in developing statistics to support requests for additional deputy clerks and in resolving problems in court reporting and jury selection.

Although their support was not as uniform, a number of judges of the Southern District of New York indicated that their circuit executive had been of significant assistance to them. One judge mentioned that the circuit executive had provided statistics supplementing those published by the Administrative Office, specifically, information regarding the number of trial days per year for each judge and the number of completed trials per judge. This judge emphasized that individual judges are isolated, and frequently are not aware of the procedures and experience of their colleagues. Therefore, circuit-wide data allowed a judge who was not maintaining pace to consider the possibility of using procedures employed by colleagues who keep their calendars more current. More generally, he felt that the circuit executive had significantly improved the administration of justice within the circuit and within the district, by helping relieve district judges of administrative burdens. However, this view was not

universal. The circuit executive's efforts were praised by some judges and criticized by others.[131]

Difficulties

Several factors have limited circuit executive assistance to the district courts. Clearly a circuit executive's first priority is to serve the chief judge and other judges of the court of appeals, and the judicial council. In some of the circuits, particularly the larger ones, the business of the court of appeals and judicial council takes most or all of the circuit executive's available resources, so he has little or no time to assist the district courts.[132] With little or

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131. The reader should note that in this chapter (and perhaps others also) our method may understate the circuit executives' impact, though it is also possible we overstate it. Broadly speaking, we approach the question as though it were similar to "consumer satisfaction": if district courts do not report substantial impact of the new office as we explored the many questions listed in appendix B, we accept their view. However the circuit executive may have been involved in many district court matters, but have made a specific effort to take a "low profile" and avoid "grabbing credit," so his efforts may not be recognized. On the other hand, we sought out judges and clerks the circuit executive suggested as best able to comment on their work.

132. Largely for this reason, in the Ninth Circuit the circuit executive indicated that he could assist the district courts only on the specific direction of the judicial council or the chief judge of the court of ap-

no staff, the executives have had little time to spare for this.

There is also doubt in some circuits that the circuit judges or judicial council have committed the circuit executive to assisting the district courts.[133] We have mentioned the two clear exceptions, the Fifth and Tenth Circuits. However, even those circuit executives do not seem to have had sufficient time to visit each district court on a regular basis or provide assistance other than with respect to certain specific projects.

Other circuits gave no special emphasis to this responsibility. For this reason a number of district judges were somewhat surprised when asked whether the circuit executive had helped them or their courts. A number indicated that they had not thought of asking the circuit executive to assist, feeling that he would not have time to do so or that the judicial council

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peals (except in obtaining visiting judges and in certain GSA work). His initial hope was to visit each district court within the circuit at least every two years. The press of other business and the size of the circuit made that impossible. With an assistant he may manage greater contact and assistance in the future.

133. Several circuit executives use or have used letterhead paper of the court of appeals, which seems to us to discourage any identification of the office with all the courts of the circuit.

would not want him to spend his time and energies on district court matters.

Another impediment is the executive's responsibility as staff to the judicial council. Since that body exercises a degree of supervisory authority over the district courts, the circuit executive is sometimes seen as a "spy" or, less pejoratively, as a "representative" of the chief judge of the court of appeals or the judicial council, or both. Thus a number of district judges in the Third Circuit expressed the feeling that greater awareness and involvement of the circuit executive in their activities and problems might carry with it greater intrusion by the judicial council in the affairs of the district court. In their view, this presented a threat to the independence of district court judges.[134]

Initially there was almost universal suspicion and even hostility on the part of the clerks of the district courts toward the office of circuit executive.

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134. This view was shared by a number of judges elsewhere, especially in the Second and Ninth Circuits. However, many in the Second Circuit felt that the circuit executive had overcome this fear or suspicion.

As noted in chapter I,[135] the Federal Court Clerks' Association and its officers, most of whom were clerks of district courts, raised the lone opposition to creation of the position. Some of the hostility, resentment and suspicion remains. In most circuits the initial concern has mostly evaporated, because the district court clerks have found either that the circuit executive can be of assistance (particularly in dealing with the court of appeals, the judicial council and the Administrative Office) or that the circuit executive neither helps nor bothers them. In several circuits a change in district court clerks has changed the climate. Also there was a prior relationship in some other instances, often where the clerk and circuit executive knew each other at the Institute for Court Management. For example, the clerk of the District of Columbia district court has found the circuit executive not a threat, but has sought, obtained and valued his assistance on occasion.

There seems also to be an attitude in some larger districts perhaps best described as professional jealousy. These clerks resent the circuit executives' high

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135. Pages 9-10, supra.

pay and status, feeling that their own responsibilities have at least equal scope and importance. Some also fear that the existence of a circuit executive will preclude creation of the office of district court executive, which they feel is needed. (Of course, in all of these cases, the district court clerk feels he is already performing the responsibilities of the district court executive; it would appear that the concern is primarily over title and salary.) There are isolated instances where the circuit executive has been of such assistance to the chief judge of a district court as to undermine the clerk's authority and weaken his position with the district chief judge, at least in the clerk's own view.

Most disappointing in relation to the purposes of the Act is the feeling expressed by the chief judge of one circuit that the circuit executive cannot deal on a personal basis with district court judges. He said--and others appear to share the view--that district court judges would resent suggestions or recommendations coming from the circuit executive or any other staff member.

Finally, the effectiveness of the circuit execu-

tive in dealing with the district courts depends on his interest and initiative, in the absence of specific encouragement by the judicial council or chief judges. It is primarily in circuits where the executive has provided assistance without specific direction from the judicial council that a strong and useful relationship has been established. The circuit executives for the Second, Sixth and Seventh Circuits indicated that they responded to problems arising in the district courts either on their own initiative or on the request of the district courts. On the other hand, the circuit executive for the Eighth Circuit has been specifically authorized by the chief judge and the judicial council to provide any assistance he can to districts having problems in handling their caseloads. The action was undoubtedly prompted by the fact that the prior circuit executive apparently saw his office as providing assistance to the judicial council, but "direction" to the district courts; it was generally reported that he never offered to assist the district courts and de clined to work with court clerks. The present circuit executive indicated that he was spending up to 25 percent of his time as an "ombudsman" for the entire cir-

cuit, and there are other reports from the courts of assistance rendered by the circuit executive.

There is some feeling among district court clerks and judges that the circuit executive can be of greater benefit to the smaller, rural districts. A number of the chief judges and clerks of metropolitan courts said they are able to deal effectively with the support units like the Administrative Office and GSA. Due to the magnitude and frequency of their contacts with those agencies it is preferable for them to deal directly. On the other hand, the smaller districts have less contact or expertise, so the circuit executive is a natural liaison for them.

Circuit Executive Assistance

Where the circuit executive has the time, interest, ability, motivation and authority to work with the district courts, he has provided many forms of assistance. While few, if any, circuit executives provided the entire range of assistance discussed here, the following discussion provides examples of ways the circuit executive can serve the district courts.

The circuit executive can be accessible to district court judges and clerks as well as to other judi-

cial and supporting personnel. Particularly in the larger circuits, the circuit chief judge may be exceedingly busy and hard to reach. Furthermore, there may be matters which do not seem important enough to justify a call to the chief judge, but which require attention or action at the circuit level. A number of judges and clerks have found that they can go to the circuit executive. Some matters he can handle directly, others he can bring to the attention of the council or chief judge at an opportune moment.[136]

Circuit executives have assisted district courts with personnel needs and problems. Perhaps most significant was the assistance of circuit executives in pro-

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136. The comments of one Fifth Circuit district clerk were rather typical. He emphasized that before the appointment of the circuit executive there was no one at the circuit level a clerk could contact. He felt reluctant to attempt to contact the chief judge directly, but in most instances the clerk of the court of appeals could not assist him. He feels that the circuit executive has filled that need: he emphasized that the circuit executive has been of real help to the district courts with respect to personnel needs, facilities and space problems, and in providing advice and assistance with respect to the operation, organization and staffing of the clerk's office. Unfortunately, other demands on the circuit executive's time sometimes prevented his offering much help. However, the circuit executive was helpful with regard to proposed changes and modifications in several of the district court plans when the clerk was attempting to ascertain judicial council policy regarding possible changes.

viding data and supporting materials justifying additional judgeships for several district courts. In the Seventh Circuit, Chief Judge William E. Steckler described a problem the Southern District of Indiana had had in obtaining additional judgeships. The circuit executive helped the court prepare data which showed, because of differences in counting prisoner petitions, that the Southern District of Indiana actually had a substantially higher caseload per judge than had been reported for other districts. This revised data convinced the Judicial Council and Judicial Conference to approve two additional judgeships.[137] (However, in several districts in other circuits the judges reported that the circuit executives had been of no assistance in preparing justification for additional judgeships.) Circuit executives also assisted district court clerks in preparing justifications for additional deputies.

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137. Unfortunately the Senate subsequently reduced the additions to one and the House eliminated that position before it was restored in the final Act. A similar situation obtained in the Northern District of New York, where the judges concluded that the Administrative Office data on their district was incorrect. The circuit executive provided corrected data, and drafted materials that were ultimately used by a senator in a floor speech that led to restoring the judgeship in question.

The executive can be especially helpful in usual situations. For example, a pro se clerk position was established in East St. Louis with the circuit executive's help in demonstrating unique need.

The circuit executives have been helpful in obtaining additional or part-time reporters. In some circuits (the Third and Sixth are examples) the circuit executive has carte blanche authorization from the judicial council to approve temporary contract court reporters under 28 U.S.C. § 753(g). However, in another circuit the chief judge specifically mentioned that the authority to approve a contract reporter for $800 was something that had to be handled by the chief judge and could not be delegated to the circuit executive. In a number of circuits, including the Second, Third and Eighth, district judges reported that the circuit executive had helped them get a swing reporter for their court.

Among management issues in district courts, court reporter problems are almost uniquely a circuit problem as well. Late transcripts delay a trial court only with respect to motions for a new trial, or preparation of findings of fact and conclusions of law in a non-

jury case. It is for the court of appeals that delay in producing transcripts may significantly delay the processing of many or most cases. This circuit-wide problem that falls between the usual responsibilities of trial and appellate courts seems precisely the sort of issue best suited to circuit executive initiative.

When serious delays arose in one district, the circuit executive mounted a comprehensive attack on the problem. After meeting with the district judges he arranged with the Administrative Office to have a widely respected court reporter from outside the circuit make an on-site study of the problem and recommend ways of alleviating the backlog and delays. After the study was made and the report issued, the circuit executive again met with the judges. The result was a program that included retraining reporters the consultant had found deficient, pooling existing court reporters, and providing some contract court reporter assistance.

Noteworthy about this episode is that the circuit executive provided technical assistance to a metropolitan district court in a very sensitive matter, and the solution involved basic changes, not simply more resources. Court reporter problems present notoriously

difficult management issues because trial judges often refuse to permit anyone else to direct or supervise their reporters. It is rare for any outsider to intervene successfully in court reporter matters, particularly where the actions include a program to remedy specific deficiencies.

While recognizing the circuit executive contribution, the judges of this district emphasized that the problems had been resolved by the court, and not through action of the judicial council. It is notable that the problem was resolved or substantially alleviated to the mutual satisfaction of all concerned without threatening the independence of the court, unnecessarily interfering with its responsibilities, or creating bad feelings between the court of appeals (or judicial council) and the district court. It is precisely this kind of service the circuit executive can best perform.[138]

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138. The problem became apparent because of long delays in preparing transcripts for appeals, particularly with respect to cases tried by two judges who spend a great deal of time on the bench and have recently tried several long criminal cases. The problem became especially serious when the court, which has a very heavy criminal caseload and an exceptional number of long criminal trials, attempted to reduce its criminal backlog in

The circuit executive for the Second Circuit helped resolve a similar problem. The Eastern District of New York, partly because of a great demand for daily copy, was late in producing ordinary transcripts. The circuit executive provided a person to make a management study, which reported that there was no management or coordination of court reporters. Here the circuit executive was able to persuade the Administrative Office to provide a person to collect data and to develop management procedures for the office. This procedure turned out to be so satisfactory that the court reporters themselves contributed funds to hire a person to serve as office manager and staff.

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order to meet the requirements of the Speedy Trial Act. By reviewing JS-10 trial forms the circuit executive was able to show that, on any given day, at least four reporters were not in court; usually more were not. Although pooling seemed a possible solution, there was hesitation on the part of some judges who questioned the competence of some reporters. There was also need to establish policy as to how much work could reasonably be expected from each court reporter.

The report filed emphasized that there was no system for sharing workloads and that this was the principal factor in the delay and growing backlog. The result was that the circuit executive and judges agreed to develop and establish a modified court reporter pool, retrain deficient court reporters, and provide emergency court reporting assistance until the backlog was cleared up.

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Proponents of the Circuit Executive Act hoped that the new position would lead to comprehensive improvement in federal court management. In addition to helping the circuit chief judge with existing administrative tasks, the circuit executives were expected to fundamentally improve management and operation of the court of appeals (and also the district courts). They were expected also to extend the scope and improve the operation of the judicial councils.

However, there was little specific discussion of precise tasks. No professional staff was provided, and the courts themselves did little to define the scope of the job. Most executives were left to develop their positions ad hoc.

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Though the executives have helped chief judges, many chief judges still spend too much time on administration. They should delegate more administrative authority to the circuit executives, who would be responsible for all matters of "organizational maintenance." Many executives spend too much time on routine matters also.

III. THE CIRCUIT EXECUTIVE AND MANAGEMENT OF THE COURT OF APPEALS 73 1/G8

Although there was obvious potential for conflict, little was done to define in advance the jobs of circuit executive and circuit clerk. The relationship has been unsatisfactory in several instances. Of three ways the positions have been defined and distinguished, the most satisfactory has been a role for the circuit executive as staff to court and council. This leaves full responsibility to the clerk to manage his office, but provides an important episodic role to the circuit executive when problems or new issues arise.

IV. THE JUDICIAL PROCESS IN THE COURT OF APPEALS 110 2/C7

Some circuit executives have instituted major improvements in the judicial process, but the record has been spotty. Some courts have limited the executives' role in "judicial business," and some executives have not taken vigorous or effective initiatives in improving the judicial process. Often the executives' time was preempted by work as administrative assistant. The scope and importance of the circuit executives' successes indicate they can accomplish a great deal.

V. ASSISTANCE TO THE DISTRICT COURTS 152 2/F7

Only a few circuit executives have had a major impact in district courts. Most have been limited by competing priorities, by their identification with the court of appeals and council, and other factors. The instances of circuit executive success in district court matters indicate a large potential role here.

VI. STAFF TO THE JUDICIAL COUNCIL AND JUDICIAL CONFERENCE 188 3/B5

Circuit executives have been useful and effective in staffing the Councils and Conferences. They have not brought a dramatic expansion of council activity, as some proponents of the Act hoped (probably this was unrealistic).

Staff work to Councils and Conferences could still bear improvement. The councils should delegate authority to make decisions on minor administrative matters. The circuit executive should present data to the council in a more manageable form.

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Some concluding observations about a changing role:

- The skills of a knowledgeable insider in the courts have proved important, as have legal skills. High-level managerial experience has been less important.

- Circuit executives have had to focus excessively on minutiae thus far, partly in order to establish a "track record."

- Now that the position is well established, circuit executives should be able to grow further into the more potent aspects of the job, helping to improve the judicial process in all courts in their circuits and strengthening the judicial councils. Also, it is to be hoped that they can have a larger and more direct role in the work of the Judicial Conference of the United States and the Federal Judicial Center.

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The circuit executive for the Second Circuit was also significantly involved in an attempt to provide court reporter assistance to the magistrates. The circuit executive encouraged one of the magistrates to draw up a report detailing the problem and making suitable recommendations. The report and recommendations were then circulated to all the magistrates within the circuit and were presented to the judicial council for its approval. These actions placed the recommendations before the the Administrative Office and the Magistrates' Committee of the Judicial Conference.

Circuit executives have obtained temporary secretaries for district judges. They have helped retain secretaries who might have been lost to the court system by finding a temporary place for secretaries of district judges who died, or who for reasons of age or ill health no longer needed a secretary. Sometimes a secretary in this situation has served as pool secretary, helping several judges as needed, and helping the court retain outstanding employees who are then available when a new judge is appointed.

In at least half of the circuits the circuit executive is involved in the assignment of visiting judges

to district courts within the circuit. In the Second, Seventh and Ninth Circuits there were several examples, and favorable comments by district judges about assistance the circuit executive had given them in locating and arranging for visiting judges to help out either with temporary emergencies or excessive backlogs. In both the Second and Ninth Circuits the circuit executives indicated that they knew the state of the docket in each of the districts and the relative backlog of the district judges individually, so they were in the best position to know when a request from a district was justified and where a visiting judge might be found. Although the Fifth and Ninth Circuits have judicial council committees, mostly composed of district court judges, to develop guidelines and arrange for the assignment of visiting judges among districts, it appears that the circuit executive is substantially responsible for recruiting and arranging for visiting district court judges.

A number of district court judges elsewhere, primarily in two circuits, indicated that they had unsuccessfully sought assistance from the circuit executive in obtaining visiting judges. In one of these circuits

the chief judge indicated that the circuit executive could not deal with individual judges, district or circuit; such liaison had to be conducted by the chief judge himself.

In the Second Circuit, the circuit executive acts as liaison with GSA for the entire Foley Square courthouse, which houses both the Southern District of New York and the court of appeals. Several judges commented that the condition of the courthouse had substantially improved due to the efforts of the circuit executive. In the District of Columbia Circuit, the circuit executive and the administrative assistant to the chief judge of the district court coordinate space problems. There were other comments of a more individual nature. The circuit executive for the Eighth Circuit assisted a new magistrate in locating and equipping his chambers. The chief judge of the District of Colorado stressed that the circuit executive had been of great assistance in providing court facilities on the western slope.

On the negative side, a number of judges in a large circuit pointed out that the new judgeship bill, if approved, would create a crisis condition in their

courthouses because there would be inadequate space for district judges and resident circuit judges alike. The circuit executive seemed oblivious to these problems. Surprisingly, some circuit executives seemed to be rather uninvolved in security measures for the buildings shared by them, the court of appeals and a district court. In one location the resident district judge indicated that there had been serious security problems and the circuit executive had been of no assistance, while in a smaller district in the same circuit the chief judge indicated that the circuit executive had assisted in working with the Marhsal's Service and had provided for enhanced security protection during an important criminal trial.

In the Sixth and Eighth Circuits a number of clerks indicated that the circuit executive had helped them in their dealings with GSA and with the Administrative Office. All these comments were made by clerks of relatively small districts (see page 167, supra).

On a more sporadic basis, circuit executives have been involved in miscellaneous district court problems, from assisting and advising district judges as to how to report outside income, to the convening of three-

judge district courts, to providing for a more effective method of distributing court of appeals slip opinions to the district judges, to advising the chief judge of the district as to what steps had to be taken to remove a United States magistrate who was not adequately discharging his responsibilities. The Fourth Circuit executive circulated the result of his inquiry into the application of the Hatch Act to court employees. The Seventh Circuit executive assisted a district court in resolving a sensitive problem as to where a particular district judge would hold court.[139]

A judge of the Southern District of New York remarked very supportively that the district court judges felt they could deal directly with the circuit executive without needing to go through the chief judge of either the district court or the court of appeals with

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139. A rather unusual problem, also in the Seventh Circuit, involved a defendant in a large narcotics conspiracy case who retained both local and New York counsel, paying the latter a substantial sum of money but receiving no services from him. After the trial had been completed the local counsel apparently refused to do any more work unless additional funds were made available. The judge contacted the circuit executive to see if he could assist. The circuit executive recommended that the court hold a full hearing on the matter of fees and forward a copy of the transcript to the appropriate New York bar association for possible disciplinary action against the New York counsel.

respect to a host of administrative and building problems such as parking. The judge mentioned the establishment of a better restaurant for judges, and an art exhibit in the lobby, as recent accomplishments of the circuit executive. This judge mentioned that he was nominally in charge of the "restaurant project" but had been able to delegate the entire matter to the circuit executive.

The Second Circuit executive has taken many different initiatives that have supported most aspects of trial court operation and work. He convened a series of conferences and exchanges with the district Speedy Trial reporters, and supported the work of a pilot group of judges in one district who implemented the final time limits early. He has organized a number of central services for the building, many serving all courts in the circuit. Improved systems to use support personnel resulted from his initiatives, including a better system to assign cases to magistrates and a system to assign probation officers to a single judge for presentence reports. Other areas in which specific improvements seem to have followed his initiatives are uniform local rules on bankruptcy, pro se clerks, in-

terpreters, law clerk training, courtroom deputy staffing, standards of decorum for courtroom deputies, service of process, telephone equipment, courtroom sound equipment, data processing, librarian salaries, and outside management help. Perhaps most notable of all, he was invited by one large court to take a leading role in recruiting their clerk of court. At the court's encouragement, he provided numerous leads to promising candidates, assisted in screening, arranged for interviews, and participated actively in each step of the selection process.

It is surprising that in many circuits few instances were reported of circuit executive help in suggesting and providing modern office equipment for the district courts. One helped provide tape recorders for use in several of the districts, others helped obtain modern filing equipment. This lack of activity is particularly surprising in view of the fact that it is generally perceived that the circuit executive is knowledgeable about office equipment and computers, and should be making that knowledge and expertise available to all courts within the circuit.

Circuit executives have frequently been involved

in training, and arranging for a variety of conferences and seminars. For example, several circuit executives have arranged for a regular conference of chief district judges, providing them an opportunity to discuss their problems and giving the circuit executive an opportunity to learn of the problems of the districts, providing what help he can. Several also have provided for training conferences for district court clerks and chief deputy clerks. The Eighth Circuit executive arranges for annual district clerk seminars, annual orientation sessions for law clerks, and has arranged joint sentencing institutes. Other circuit executives have particiapated in planning sentencing institutes,[140] and workshops for district judges and conferences for magistrates, usually under Federal Judicial Center auspices. The circuit executive for the Fourth Circuit has arranged an annual orientation conference for law clerks.

Skepticism and concern was expressed over the value of some conferences, and of the executive's role. In one circuit a judge suggested that the circuit executive's responsibility was limited to arranging for

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140. 28 U.S.C. § 334.

"coffee and doughnuts" and other administrative matters, and that he was not involved in substantive planning or preparation. In another circuit there had been only two clerk conferences in three years, both arranged by the clerks themselves with the assistance of the Administrative Office, without any participation by the circuit executive.[141] Some clerks in circuits where the executive planned and convened a conference complained that they had been unproductive.

Since few circuit executives have been much involved in the organization, staffing or operation of the clerk's office for the court of appeals, or in improving case management at the court of appeals, it is not surprising that few have had much impact on the district courts in those areas. However, the circuit executive assisted in a reorganization of the clerk's office for the Southern District of New York that followed the change of that court from a master calendar to an individual calendar. More recently, he assisted

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141. It perhaps should be noted that in at least two circuits, and perhaps more, prior to the establishment of the office of circuit executive the clerk of the court of appeals was arranging for conferences of clerks of the district courts and, in some cases, other supporting personnel.

the district court in implementing a pilot program designed to organize the court, both judges and supporting personnel, into clusters of four or five judges and associated supporting personnel to improve and decentralize management and support. In the Tenth Circuit, the circuit executive, according to a district chief judge, spearheaded a computer program to assist the Central Violations Bureau Project. This project will automate receipt and processing of federal traffic offenses occurring in national park and other federal land in all districts in the circuit.

Circuit executives have sometimes requested collection, analysis and dissemination of data on district courts beyond what is published by the Administrative Office. While this has been some burden on the clerk's office,[142] it has been valuable to several judges. The Second Circuit executive provides, on a monthly basis for each judge of each district, the number of cases filed and terminated both civil and criminal, and the

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142. One district clerk characterized the circuit executive as a "costless consumer;" he is able to require the clerks of district courts to collect data and materials at no cost to the circuit executive, but at significant cost to the operation of the district court clerks' offices.

increase or decrease in backlog. Additional data deal with trial days and other internal information. The chief judge of one metropolitan district court commented positively on the value of such data, feeling that "the more we can tell each other about what we are doing, the better off we all are." Although these data are also collected to keep the judicial council informed about the work of the district courts, they benefit the district courts directly. However, several district judges feel the data collection and dissemination is highly improper, primarily because they provide "ammunition" to the council.

In at least two circuits, the Fifth and Seventh, the circuit executives have been instrumental in establishing federal public defender and community defender offices. In both circuits, the circuit executive became aware of problems in the various districts primarily through reviewing appellate cases, either for calendaring purposes or in connection with Criminal Justice Act vouchers. They collected the necessary data to justify the new offices and forwarded the information to the chief judge of the affected district court,

explaining what steps to take to establish the office, if the court chose to do so.[143]

An Unfinished Job

Two points can be drawn from the above sampling of circuit executive assistance to the district courts. First, it is clear that there are many areas where a circuit executive can assist the district courts. Second, it is equally clear, except in two or three circuits, that the assistance provided has been sporadic at best. Thus it is not surprising that almost all persons interviewed in connection with this study indicated that the circuit executive should be doing a great deal more to help the district courts. Even in the Sixth Circuit, a few district judges indicated that the circuit executive should be doing more to help them with their problems, especially problems relating to case management.

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143. In one district in the Seventh Circuit the circuit executive, based on his reading of briefs and transcripts of cases handled by appointed counsel, became convinced that the quality of legal representation could be improved through the establishment of a federal public defender's office. He helped establish an office shared with an adjacent district, so public defender service is available to both districts even though the caseloads fell outside of the guidelines established.

Elsewhere this view was more common among circuit judges than district judges. For example, in the Third Circuit the chief judge and several other circuit judges indicated that a primary task of the circuit executive should be to assist the district courts.

Clearly, providing more than episodic assistance to the district courts would require that the circuit executive visit them occasionally. Some visits should be of several days. In this way he would get to know the personnel within the district, learn of their problems and be familiar enough with the setting to suggest workable solutions. The problem with this suggestion is obvious. The Fifth Circuit, for example, has nineteen districts; a week spent in each district would pre-empt nearly half a year. However, several executives have had remarkably little contact with their courts. A short visit each year, and a rotating visit of three days or so every three or four years would be a minimal burden in most circuits.[144] As the execu-

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144. There were too many complaints that the circuit executive had failed to visit the district courts, particularly the clerks' offices, even when they were in the building. While there may be justification for the failure of the circuit executive in large circuits to have visited each of the districts, there seems to be

tives fill the new position of administrative assistant, they will have more time to work with the district courts.

Unlike other roles assumed by circuit executives, the role discussed in this chapter did not generally exist before. Although the clerks of a few circuits did arrange conferences for district court clerks, and may occasionally have attempted to help district court judges and district court clerks with management and administration problems, there has been no one who could bring both the perspective of an outsider and the expertise of a court manager to bear on the problems of the district courts. Also there is no one else who, because of his dealings with the Administrative Office, GSA and other agencies, can assist district court clerks and judges in resolving problems that may appear unique to them, but to the circuit executive may be relatively common.

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no reason for any circuit executive not to spend a few hours with personnel of the districts when he is there on other business.

CHAPTER VI

STAFF TO THE JUDICIAL COUNCIL AND JUDICIAL CONFERENCE

Background

The circuit executive is an officer of the judicial council. He is appointed by the council and is, by statute, authorized to "exercise such administrative power and perform such duties as may be delegated to him by the circuit council."[145] As indicated in chapter I, there was considerable hope when the Act was passed that it would remedy some perceived failings of the councils.[146] These include a supposed failure to exercise their supervisory authority,[147] and failure to

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145. 28 U.S.C. § 332(e). Although most of the specific duties the statute suggests for possible assignment to the circuit executive involve management of the court of appeals (see chapter III, supra), two relate directly to the council: (1) conducting studies and preparing reports and recommendations to the chief judge and the circuit council and (2) arranging meetings of the circuit council.

146. See notes 33-37 supra, and accompanying text. These matters are discussed more fully in our companion report, S. Flanders and J. McDermott, Operation of the Federal Judicial Councils (Federal Judicial Center 1978).

147. See P. Fish, The Circuit Councils: Rusty Hinges of Federal Judicial Administration, 37 U. Chi. L. Rev. 203 (1970).

achieve the administrative decentralization expected when they were created.[148] Many judges interviewed in connection with this project emphasized that one of the major reasons for the establishment of the office of circuit executive was to improve the effectiveness of the judicial council, particularly in its dealings with the district courts.[149]

The companion report of this project describes the work of the judicial councils.[150] This report describes how the circuit executives have served their respective judicial councils in light of the hope that the new position would add new dimensions to council work.

Impact On the Councils

The circuit executive is limited in his opportunities to achieve basic changes in council respon-

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148. See J. Ebersole, Implementing the Circuit Executive Act (October 18, 1971) (unpublished paper in the Federal Judicial Center library).

149. Although virtually all judges acknowledge that this was a major purpose behind the establishment of the position, most of the judges interviewed saw the circuit executive's assistance to the chief judge and the court of appeals as his most important responsibility.

150. Note 144 supra.

sibilities or operation. He cannot be expected to supply leadership for the council and certainly should not assume its responsibilities; his function is only to serve as staff to the judicial council. As a number of judges and circuit executives emphasized, the role of the circuit executive with respect to the judicial council must depend on the council's own perception of its role and responsibility. It seems fair to say that many circuit judges are not very interested in the work of the judicial council. Some emphasized that they were appointed appellate judges, not court administrators.[151] Others see the judicial council as a relatively unimportant entity.[152] In particular, we found very little enthusiasm for an increased council role in a more decentralized judiciary.

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151. Of course, since 1939 anyone appointed a circuit judge automatically became a member of the circuit's judicial council. There is no more justification for a circuit judge to ignore his administrative responsibilities as a member of the judicial council than his judicial responsibilities as a member of the court of appeals.

152. One judge suggested that there is not much that the judicial council does that is "really important," while another suggested that the council had "minimal potential influence."

The circuit executive can hardly be expected to change these attitudes and perceptions. However, he can provide significant initiative and direction.

In some circuits the judicial council has been the chief judge. In one circuit there were numerous comments that the prior chief judge had handled "council matters" entirely on his own without involving either the circuit executive or the other members of the council. Since the chief judge is chairman of the judicial council, he must provide leadership and direction for the council if it is to have much vitality. If he acts largely on his own, other judges may not be inclined to object. If he is uninterested in the problems of the district courts the council is not likely to be attentive to those problems.

Some chief judges have recently taken steps to counteract the apathy of some of their colleagues. Particularly in the large circuits, they have attempted to involve all of the circuit judges in the administration of the circuit by delegating administrative responsibility to judicial council committees.[153] The

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153. In most circuits such committees are composed of only circuit judges, but in several they include dis-

availability of the circuit executive has facilitated the expansion of the judicial council committee structure. He can provide some staff support for committees, adding to their effectiveness and reducing the burden of committee work on judges. Unfortunately, in some cases expanding the committee structure has led judicial council committees to do work that could be delegated directly to the circuit executive.

There is some doubt among the judges of several circuits, especially the Third and Tenth, as to the extent of the council's authority to supervise district courts. This uncertainty undoubtedly results from the fact that council action in dealing with a district court was repudiated by a specially constituted court of appeals in a Third Circuit case, and was not supported by the Supreme Court in a Tenth Circuit case.[154]

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trict judges as well. A number of second circuit committees also include lawyer members.

154. In re Imperial "400" National Inc., 481 F.2d 41 (3rd Cir. 1973), cert. denied, 414 U.S. 880 (1973); Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74 (1970). The "Imperial 400" case illustrates one of the ambiguities associated with council action. There the entire council--all of the active circuit judges--directed the district court to remove an attorney in a bankruptcy proceeding. A three-judge panel of the court of appeals (composed of three out-of-

Even with an "active" council, there may be other obstacles to effective staff support. For example, one of the most beneficial roles that the circuit executive can play with respect to the judicial council is to serve as liaison between the council and the district courts. However, in some circuits the "resident" circuit judges have traditionally carried out this responsibility. In some cases they continue to do so.

Finally, and perhaps most important, a purpose behind the creation of the eleven judicial councils was to achieve a degree of decentralization of the administration of the federal courts. The extent of actual decentralization has been minimal, however. There is some evidence that the Administrative Office is willing

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circuit judges) later reviewed the district court's action and held the council order improper on procedural grounds. Yet, at page 46, Judge Aldrich for the court said the councils have a "broader responsibility, to oversee the district court as a whole, not just in regard to day-to-day operations and internal problems, but in the larger perspective of the court's place in the body politic . . . ."

Similarly supportive language appears in the Chandler case, both in Chief Justice Burger's opinion for the Court (at 85, for example) and in Justice Harlan's lengthy concurring opinion. However, the dissents of Justices Black and Douglas seem to have been very influential: many judges, circuit and district, referred to the case almost as though the dissenters had spoken for the Court.

to delegate certain limited responsibilities (such as the furniture budget, and possibly others) to the judicial councils. Also, some recent legislation has empowered the councils to review district court plans and obtain court reporters by contract, for example. Otherwise, little has changed, though the councils do carry out the decentralized supervision intended.[155]

Whether the circuit executive has succeeded in "vitalizing" the judicial councils is a question that defies a single answer. The perceptions of individual judges vary.[156] In most circuits, especially those that take a passive view of their supervisory responsibility toward the district courts, the circuit executive is not often used in any meaningful way beyond routine staff assistance. Occasionally he is asked to investigate specific problems or emergencies. Sometimes he has an important role in reviewing plans the

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155. See Flanders and McDermott, note 145 supra, esp. pp. 26-35.

156. In one circuit, several judges commented that the circuit executive had strengthened the council by providing staff support, but another judge commented that the circuit executive "hadn't done very much to help the council." In another circuit a judge who recognized this to be a major function of the Circuit Executive Act concluded it was its greatest failure.

district courts must submit.[157]

However, the second circuit council has increased the scope of its activities in many areas. In some degree this can be attributed to the presence of the circuit executive. By recognizing or even anticipating problems, and suggesting council action (or the appointment of a council committee to undertake an investigation and recommendation), the circuit executive has encouraged the judicial council to increase its sensitivity to the problems of the district courts and to press for a larger role in relation to the Judicial Conference of the United States. In other circuits, notably the Sixth, the circuit executive provided assistance to the district courts in a successful attempt to resolve local problems before they reach a state that requires judicial council attention or action. He has done this with the general approval of the judicial council, but usually without specific direction. Given the relatively passive role of most judicial councils, it may be that the circuit executive can best serve the council by assisting the district courts in solving

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157. See notes 165-167 infra.

their own problems so that the judicial council need not become involved.

Only the Fifth Circuit attempted to define the circuit executive's role in advance. According to the report of their Circuit Executive Committee, adopted by the Fifth Circuit Judicial Council, the circuit executive was to:

(1) Serve as secretary to the council,

(2) Prepare the schedule of meetings as directed by the chief judge,

(3) Coordinate and prepare the agenda for meetings,

(4) Prepare reports containing background, evaluation and recommendations regarding subjects on the agenda,

(5) Based on council decisions, prepare policy statements, orders and rules for signature by the chief judge and the council,

(6) Take and prepare minutes of the council meetings, and

(7) Study the duties, functions, practices

and procedures in other circuits and inform the council.

This is a fairly narrow list for a "managing partner." All but the fourth and seventh items are purely ministerial; even those items are reactive only.

Secretary to the Judicial Council

Section 332(e)(9) recommends that the circuit executive attend judicial council meetings and serve as secretary for the council. In most circuits the clerk of the court of appeals had served as secretary.[158] In three circuits, however, the junior judge had prepared and distributed the minutes to the members of the council.[159] In nearly all circuits the circuit execu-

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158. In the Ninth Circuit the junior judge had been the secretary to the judicial council. Neither the court clerk nor any other staff had attended or participated in judicial council meetings, and some judges initially objected to the circuit executive's presence.

159. One judge mentioned that this responsibility took up to 40 hours per year. Thus the mere fact that this responsibility has been assumed by the circuit executive has resulted in a substantial saving of judge time in several circuits. Former Chief Judge J. Edward Lumbard of the Second Circuit mentioned that, as chief judge, he personally prepared the agenda for each council meeting and spent a great deal of time and effort in preparing for council meetings. In handling these matters the circuit executive saves substantial time of the chief judge.

tive now serves as secretary to the judicial council.[160]

In circuits where the clerk previously handled these duties, there were indications that this function was being better handled by the circuit executive. For example, the Sixth Circuit executive emphasized that as clerk he merely attended meetings and prepared the minutes. He was not responsible for preparing the agenda, providing supporting materials for the meeting or implementing the decisions and policy of the council, as he does now. Furthermore, there were several indications that council meetings in many circuits are now more efficient because the circuit executive reviews many of the matters on the council's agenda, and makes recommendations for council action that could be quickly voted upon by the council. In the Fifth Circuit, the circuit executive prepares a "book" for each judicial council meeting, which contains reports and other supporting material for each item on the agenda. This compilation helps to expedite the discussion of agenda topics and action on them.

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160. In two circuits the clerk still serves as secretary to the council but the circuit executive also attends council meetings.

The clerks have generally been displaced by the circuit executive; in less than half the circuits does the clerk still attend council meetings. This might not present a problem if most meetings were restricted to judicial council matters.[161] However, a review of numerous agendas of judicial councils reveals that, in most circuits, between one-half and two-thirds of the items on the agenda dealt with court of appeals matters only.[162] Since so much of the business transacted at

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161. Only in the Third Circuit was there a determined effort to distinguish between judicial council issues and concerns of the court of appeals dealing with its own administrative problems. Separate meetings are held (sometimes they are consecutive) and separate agendas are prepared. The circuit executive serves as secretary for both meetings.

162. A typical agenda contained the following items for discussion and possible council action:

(1) Report by the custodian of the library fund and others,
(2) Report of the senior staff attorney,
(3) Report on petitions for review of bankruptcy judge orders pending in the district court more than 60 days,
(4) Discussion of screening panel procedures,
(5) Review of cases under advisement by the court of appeals,
(6) Consideration of a salary increase for the circuit executive,
(7) Discussion of the use of the circuit executive's discretionary fund,
(8) Report of a committee studying the reorganization of the circuit's judicial conference,

most council meetings deals with the court of appeals it is unfortunate that the clerk is sometimes not present. This further tends to isolate the clerk from the court. In other circuits both the clerk and the circuit executive attend judicial council meetings, each handling distinct matters.[163]

The full extent of the circuit executive's staff

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(9) Discussion of proposed revisions to the court of appeals' plan for expediting criminal appeals,
(10) Approval of attorney's expenses in civil cases to be paid from the library fund,
(11) Discussion of plans for holding court in various locations throughout the circuit as part of the court's Bicentennial program,
(12) Discussions relating to striking disciplined attorneys from the roll of attorneys admitted to practice in the court of appeals,
(13) Approval of the recommended places of holding court during the next term,
(14) Discussions of amendments to the division lines for one of the districts within the circuit.
(15) Discussions concerning the practice of providing complimentary slip opinions to several newspapers,
(16) Approval of the services of a judge as the executor in an estate.

163. In the Fifth Circuit not only do the clerk and circuit executive regularly attend judicial council meetings but other staff members, including the chief deputy clerk, librarian and senior staff attorney, also attend and participate on a regular basis, as requested.

support beyond serving as recording secretary is not always readily apparent. In the nature of staff work, his contribution is muted in varying degrees. A review of the minutes of several Second Circuit council meetings reveals that the circuit executive is highly visible at such meetings, presenting reports and making recommendations to the council. By contrast, a review of the minutes of several Fifth Circuit judicial council meetings did not disclose extensive participation by the circuit executive. However, it is clear in both circuits that the circuit executive is providing extensive staff support to the judicial council. The difference in visibility reveals something about the structure and operation of the two councils. Although the Second Circuit has a number of standing and ad hoc committees, much of the council business, particularly that of a routine nature, is handled by the chief judge and/or the circuit executive. Thus, the circuit executive presents many matters directly to the council with recommendations for council action. In the Fifth Circuit almost all matters, even relatively routine ones, are referred to a judicial council committee for study and recommendations. Committee recommendations are

then made by the committee chairman to the entire council for its approval. The circuit executive's involvement is not readily apparent, but we were advised by a number of Fifth Circuit judges that the circuit executive does most of the committee work, presenting a report to the committee which it generally adopts and presents to the council.

It is undoubtedly beneficial to make substantial use of judicial council committees, especially in larger circuits, in order to make council meetings more efficient and insure that some judges give detailed attention to matters brought before the council. However, it seems that many more routine matters could be handled by the circuit executive and then presented directly to the entire council for approval.

There are four major areas in which the circuit executives have provided staff support to the judicial councils:

(1) Preparing summaries and recommendations with respect to judicial council review of such normally routine matters as salaries for part-time magistrates and bankruptcy judges,

(2) Conducting studies and investigations on specific problems and then making reports to the council with suggestions and recommendations,

(3) Analyzing the various plans submitted by district courts to the judicial council for its approval, and

(4) Serving as a member (or reporter) of judicial council committees.

Approval of Routine Matters

Judicial councils are required by statute to approve the appointment and salaries of bankruptcy judges and magistrates. Many part-time magistrates and bankruptcy judges receive a very modest salary (a few receive less than $1,000 per year) and approval by the judicial council may be routine. In many circuits the circuit executive expedites the review and approval of such requests by preparing a brief summary of the request, including pertinent information such as the number of matters handled by the magistrate or bankruptcy judge in the past year.[164]

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164. In some circuits the circuit executive's review, evaluation and recommendation of such matters may be

In some circuits these matters may be handled by mail. The circuit executive prepares a summary and recommendation and circulates them and any supporting materials to each member of the judicial council. They notify the circuit executive of their approval or disapproval of his recommendation. If all approve, the circuit executive notifies the Administrative Office and handles the necessary paperwork. In these circuits such routine matters are not placed on an agenda for council meetings unless the chief judge, the circuit executive, or the resident circuit judge (or any other member of the council) indicates the matter requires full council discussion.

In two circuits there were indications that needless judicial council time was spent discussing routine matters because the circuit executive did not prepare a summary and analysis. There were no specific reasons given why these two circuit executives were not handling what is a routine task for most of their colleagues. However, in one circuit the chief judge gen-

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superfluous. Several councils seem reluctant to disapprove requests when approved by the chief judge of the district courts and the appropriate division of the Administrative Office, or where the resident circuit judge concurs.

erally prefers to deal directly with the district judges. In the other there was a widespread lack of confidence in the effectiveness of the circuit executive. In a few other circuits the staff report and recommendations are made not to the council but to the chief judge, who then obtains the routine approval of the council--an effective use of the circuit executive.

Conducting Inquiries and Collecting Data

Prior to the Act, information about local problems was gathered either by the chief judge, a committee of the council, or frequently by the resident circuit judge. In several circuits the resident judge remains responsibile for making an informal investigation and reporting to the council, but in most circuits such studies are now made by the circuit executive. One circuit judge referred to the circuit ex cutive as the judicial council's "field man" and mentioned that the circuit executive had been involved in such things as coordinating the FBI check of a nominee for a federal public defender position, and attempting to uncover the cause of delay in the processing of habeas corpus petitions in the district courts. (However, in the latter instance the chief judge suggested that the data

collected and presented by the circuit executive were inadequate due to the fact that he did not have sufficient time to do a thorough job and because he was not a lawyer.) The Ninth Circuit executive made a study of the authorized places of holding court in each of the districts within the circuit and submitted a report to the council for its action.

The Sixth Circuit executive was described by the chief judge as the "investigative arm of the judicial council and its committees." In addition to formulating and implementing a plan to help court reporters in a large district to keep current with their transcripts, the circuit executive has resolved a problem in one district resulting from the court's failure to follow its jury selection plan. As do several others, he routinely follows up on the Administrative Office list of old cases and motions under advisement.

In addition to investigating specific problems referred by the judicial council, some circuit executives have attempted to advise the council of any district court problems. The Second Circuit chief judge commented on the importance of the continuing data on the district courts compiled and prepared by the cir-

cuit executive and presented regularly to the judicial council. Not only does the information provided encourage the district courts and the individual judges to take action to remedy existing problems, it also informs the judicial council of existing or incipient problems within the circuit and allows the council to provide whatever direction and assistance is appropriate.[165]

Most circuit judges indicated that their circuit executive effectively conducted whatever studies and investigations were specifically requested by the council. However, there was a general feeling that the circuit executive could be providing better information on the district courts either by maintaining close personal contact with the district court judges and clerks or

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165. For example, case flow data for the district courts presented to the Eighth Circuit judicial council by the circuit executive revealed the existence of a serious backlog in the Eastern District of Arkansas. The council responded by temporarily assigning several district judges and magistrates to that district to help relieve the backlog.

We have made other suggestions in our report on judicial councils, supra note 146) at pages 22-26 and 51-52. We conclude that the circuit executives could strengthen council work considerably through better use of available data. Appendix D of that report (pages 87-94) discusses the uses and limitations of the judicial statistics system for judicial councils.

by collecting, analyzing and monitoring data relating to district court productivity, backlogs and other problems.

Review of Plans

The judicial councils are required to review and approve plans prepared by the district courts pursuant to several statutes, including the Jury Selection and Service Act,[166] the Criminal Justice Act,[167] and the Speedy Trial Act.[168] The extent of a particular circuit's need for staff assistance in discharging this responsibility depends on the council's purpose in reviewing the district court plans. If, as is the case in some circuits, the council's purpose is merely to ensure that the district court plan conforms to the enabling act or to guidelines promulgated by the Administrative Office or Judicial Conference of the United States, the required staff analysis may be limited. It must be more comprehensive if the council's purpose is to ensure that the plan will be effective, or to

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166. 28 U.S.C. § 1863.

167. 18 U.S.C. § 3006A.

168. 18 U.S.C. §§ 3165 & 3166.

achieve uniformity among districts.[169] Based on comments of many circuit judges, and our review of a number of memoranda containing circuit executives' analyses and recommendations, it appears that in all but two or three circuits the circuit executive is doing an outstanding job in making these reviews and recommendations.[170]

In spite of this, there has been little involvement of the circuit executive in the actual preparation of the district court plans. Since the circuit executive is familiar with the council's policy and its prior action on plans submitted by other districts, he can be valuable to district courts in drafting plans, or changes and amendments to existing plans. In the District of Columbia Circuit, the circuit executive indicated that he had offered to assist the district

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169. According to one Ninth Circuit judge that circuit's review is "to achieve compatibility not uniformity."

170. It did seem in one or two circuits that the staff analysis and recommendations may have a minimal impact on the council's decision. There were indications that the council either accepted whatever plan was submitted by the district court or relied on the recommendations of a liaison judge, a council committee or, especially, a resident circuit judge.

court in preparing its plans but the district court never sought his advice or assistance.[171]

Judicial Council Committees

There is wide variation among the circuits with respect to committee structure and activities. In some circuits there are few judicial council committees and those are generally composed only of circuit judges. In other circuits there are both standing and ad hoc committees; in the Second Circuit, for example, some of these include both district judges and practicing attorneys. The Fifth and Ninth Circuits have an unusually large number of committees.[172] In the Second,

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171. There seem to be a growing number of problems relating to plans, approved by the judicial council, which now present legal questions to be decided by the court of appeals. Judge Jack B. Weinstein has pointed out that courts of appeals often, in effect, find themselves reviewing their own plans when litigation reaches them questioning a district plan that, in turn, was based on a judicial council model. See Reform of Court Rule-Making Procedures 126 (1977).

172. In addition to its regular judicial council meetings, the Ninth Circuit holds a yearly weekend conference or symposium (not the Judicial Conference) at which time the council deals with major problems that cannot be handled at routine meetings. There is a rotating chairman (a judge) who seeks ideas and suggestions from other members of the court and prepares the agenda for the conference. The circuit executive then arranges the details and handles administrative matters.

Fifth, and Ninth Circuits, the circuit executives have been extensively involved in staff support. In some other circuits, it appears that the circuit executive often serves more as a passive reporter for the committees, and provides administrative staff support.

The most extensive involvement of the circuit executive in the judicial council committee structure occurs in the Second Circuit. The circuit executive often serves as a member of the committee, and acts as liaison between the committee and the chief judge, not simply as the secretary or reporter for the committee. In many cases it was the recommendation of the circuit executive that resulted in the creation of the committee in the first place. This approach is in keeping with the Second Circuit executive's perception of his role as the person who identifies problems, alerts the council to them, and conducts studies and suggests solutions without waiting for specific direction from the council.

Delegation of Authority

In Chapter II we suggested greater delegation of authority by many chief judges to the circuit executives. The same issue arises with respect to the judi-

cial council, as the degree of delegation varies among the circuits. In some circuits the judicial council has given the circuit executive the responsibility to approve requests from district court judges for employment of temporary reporters pursuant to 28 U.S.C. § 753(g). In the Third and Sixth Circuits, the delegation is virtually absolute, and the circuit executive handles all requests from the district courts. If he determines that the request is justified, he arranges with the Administrative Office for specific authorizaton for a contract. The extent of the circuit executive's authority in the Fifth Circuit is less clear, however. The judicial council delegated to its circuit executive the authority to act on behalf of the council on request of district judges. However, the resolution also requires the approval of the resident circuit judge.[173]

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173. The Fifth Circuit resolution provides as follows:

> Resolved: that the judicial council . . . does hereby delegate to its circuit executive the authority to act on behalf of the judicial council on requests of any chief judge of any district court of this circuit advising that additional court reporters are needed on a temporary basis and to determine whether the number of court reporters provided any such

The second circuit executive emphasized that routine operating problems normally are and must be his responsibility, without necessary reference to either the council or chief judge. Of course the judicial council must resolve all policy matters, but the circuit executive indicated that he should be the one to relieve judges of handling day-to-day problems. When he receives telephone calls from district judges on matters without policy implications he is free to deal directly with the district judges and agencies involved, sometimes without prior specific approval or even knowledge of the chief judge of the court of appeals or the judicial council. The Sixth Circuit executive has similar discretion to act for the council in routine matters; he terms these matters "organizational

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district pursuant to 28 U.S.C. § 753(a) is insufficient to meet temporary demands and needs and that the services of additional court reporters for such district court (including the senior judges thereof when such senior judges are performing substantial judicial services for such court) are needed on a contractual basis. The circuit executive is delegated the authority to communicate determinations made by him with the concurrence of the resident circuit judge who monitors the particular district court concerned, to the director of the Administrative Office on behalf of the judicial council. (Emphasis added).

maintenance." This discretion seems necessary if the councils are to be relieved of detail work.

One Second Circuit district judge pointed out that the circuit executive had proven his value as a "troubleshooter" for the district court as well as for the court of appeals. He also mentioned that an individual judge can deal directly with the circuit executive without having to go through either the chief judge of the court of appeals or the chief judge of the district court. He mentioned problems such as alloting parking spaces in the courthouse and arrangements for an art exhibit in the courthouse--all of which were handled by the circuit executive (by his staff, actually) without having to burden either the chief judge or the judicial council.

There can be no doubt that the circuit executive must be circumspect in his dealings with the district court, and cannot speak for the judicial council unless authorized to do so. However, it seems desirable to encourage the circuit executive to work with the district courts and other judicial agencies in an attempt to resolve problems early. Forestalling a crisis or breakdown that requires extensive judicial council in-

volvement or action is clearly useful. We recommend that the circuit executive be given such leeway, with an understanding that he advise the members of the council regularly of his activities.

Secretary to the Judicial Conference

The Circuit Executive Act suggests the circuit executive be responsible for arranging meetings of judges of the circuit.[174] This undoubtedly includes the annual judicial conference. All circuit executives are substantially involved in planning the annual judicial conference. In the Fifth and Ninth Circuits the circuit executive indicated that preparing and making arrangments for the annual judicial conference was an enormous task. Obviously the arrangements are more complex in these large circuits.

In several circuits there were indications that the circuit executive had relieved judges of a substantial burden, thus freeing them to devote more time to judicial activities. However, in most circuits it appeared that the circuit executive had merely replaced the clerk as the person who made the arrangements for

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174. 28 U.S.C. § 332(e)(9).

the judicial conference, although there were some indications that the conferences were now being better managed. In all circuits the clerk was pleased to be relieved of the burden of the conference.

In one or two circuits the circuit executive seemed to be spending excessive time on administrative details and arrangements.[175] With some notable exceptions there was little evidence that circuit executives had been meaningfully involved in planning the content and scope of the conference. Since the circuit executive should be uniquely aware of problems at both the district and appellate level he should be able to contribute much to planning the substance of the conference.

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175. The Fifth Circuit executive has developed a comprehensive system for planning the annual conference. While these plans are most impressive, it seemed that most of the arrangements could now be handled by someone else, either on his staff or from the clerk's office. Most of the work is now done by his assistant and his secretary. Perhaps some thought should be given to hiring someone on a temporary basis (using conference revenues) to handle many of the details now handled by the circuit executive.

CHAPTER VII

TRANSITION AND GROWTH

Up to this point we have surveyed circuit executive activities by dividing the role into component parts. Sometimes the divisions have been artificial, separating closely related tasks from one another. In this final chapter we assemble some observations that bear on the circuit executives' experience as a whole.

The role of circuit executive is in constant change, which makes it difficult to appraise in this report. Our central difficulty lies in this paradox: we must treat as an institution something that is not institutionalized yet. There is no stable or uniform role for the circuit executive. Not only do their assignments and activities vary, but the expectations of those around them differ, change, and are sometimes mutually incompatible. The circuit executive institution today is simply the sum of the diverse assignments and activities of ten individuals, plus the experience and reactions of those they work with or serve. This is the reason we have been unable to avoid the occasional _ad hominum_ character of this report. For the same rea-

son, it would be pointless to be dogmatic about many of our recommendations.

The circuit executives themselves have had little guidance as they each defined the scope of their own work. What little guidance was available consists mostly of the hopes expressed when the Act was passed, and requests to undertake specific tasks. Taken together, the demands and requirements have been both excessive and conflicting. Probably the most useful purpose this report could serve would be to contribute some guidance based on our estimate of the relative impact and importance of the alternative commitments circuit executives have made and can make.

An Insider

Perhaps our greatest surprise concerns the relative importance of skills a circuit executive brings to the job. The legislative history emphasizes skills new to the judiciary, especially those of industrial management. Indeed, the Board of Certification was evidently intended to assure that the courts would consider outsiders with entirely new skills and perspectives. Senior-level experience in managing large organizations was especially desired. This infusion of

top management was intended to transform and modernize the courts.

It has not worked that way. Least surprising is that the recruiting base turned out to be relatively narrow. Many people are very critical of the Board of Certification for certifying so large a number of retired military officers. It seems to us probable that the Board had little alternative. Clearly the Board correctly acted on a Congressional intent in treating with skepticism the applications of circuit clerks and other court support personnel, unless they could show substantial outside training and experience.[176] On the other hand, if Congress intended to supplement existing staff with captains of industry, the Board could not help; few applied. Surely it would be unrealistic to expect the judiciary to attract successful business executives at mid-career. Executive Level V (currently $47,500 per year, it was $36,000 in 1971) is impressive within the federal bureaucracy and among courts, but not in industry.

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176. See, e.g., testimony of Bernard G. Segal, July Hearings, esp. at 31, and of Newell W. Ellison, November Hearings at 427. There are also supportive comments of Chairman Emanuel Celler, July Hearings at 26.

Accordingly, at the cost of considerable conflict and lasting bitterness, the Board resisted several circuit courts' efforts to appoint their clerks. It certified people who could show training in court management, and also outside managerial experience. Often this experience was in the military, partly because retired officers were available, and could show managerial experience. Several of those certified were not lawyers.

We see little hope that outside managerial experience can be tapped because circuit executives primarily carry out staff functions. The scope for direct management is modest at present; it is limited to what one executive calls "organizational maintenance" within the court of appeals. The circuits are very different from industrial divisions because they are not financially or administratively autonomous;[177] in short, they are not responsible for returning assigned levels of prof-

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177. This would be true even if there were considerable decentralization to the circuits of most resource allocation. If that were done the circuit executive would be much more a manager, but still would not have responsibility comparable to the head of an industrial division.

it, with the high degree of autonomy that implies in modern industrial organizations. Of course the policy purpose for providing that autonomy does not exist in the federal judiciary, because there are very narrow limits on likely reallocation of circuit resources. For example, no circuit manager could determine that jury trials should be eliminated as a losing proposition, in favor of a more profitable line. Nor can any state or district be abandoned in favor of others. A manager who cannot eliminate any line of business or any geographical area in favor of others is operating within a narrow range of options.

The circuit executive's job is to make the system work better, and also to support some existing activities. To be sure, he often needs resources, but always in amounts that are small in relation to total expenditures. The skills he needs are those of an experienced insider, albeit one who can take a fresh look at old problems. He needs the experience and originality that will suggest new solutions, and complete familiarity with possible procedural alternatives. He also needs a sound intuitive sense of the practical possibilities in each court of the circuit, based on close knowledge of

individuals, geography, past practice, and perhaps the law.

Thus we consider the skills of insiders to be necessary but not sufficient. Some court clerks have the needed insider skills and knowledge, and also can identify problems and propose solutions in an original and effective fashion. For this reason, clerks and other court employees should not be excluded from certification. Nor should there be any presumption against lawyers. Legal skills and experience have proven helpful, and non-lawyer circuit executives have been hampered in some degree. Because insider skills alone are not sufficient, however, we can certainly support an idea that recurs in the legislative history: it would be unfortunate if the Act simply resulted in promoting most or all circuit clerks, or if the courts appointed lawyers without demonstrated administrative skills or training.[178]

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178. The foregoing discussion might suggest that we see no remaining purpose for the Board of Certification. If insiders are often suitable and some specified outside skills not relevant and generally unobtainable, then the Board's purpose is certainly reduced. Important purposes remain, however: to propose a large pool of outside talent, and check the natural inclination to promote from within.

Finding a Niche

Only gradually are the executives defining their permanent role. A large part of the confusion about their role stems from a central task each of them faced when appointed: to develop a track record quickly. Since the position was virtually undefined in all but two circuits, and they had few specific operational responsibilities, most felt that they could not afford to turn anything down. This imperative (and the shortage of staff) may explain their commitment to some tasks that seem clearly incompatible with the purpose of Congress: drafting routine correspondence, managing all GSA contacts regarding the court of appeals courthouse, routine involvement in processing individual appeals, and others we have mentioned.

Early assignments of circuit executives were governed also by specific needs at the time. Library services were generally inadequate, and most executives made a major contribution; most libraries are now better supported, better staffed, and provide much better service. The chief judges particularly needed an administrative assistant, and had specifically requested one. When they got a circuit executive instead it was

natural that many early assignments were those they would have assigned an administrative assistant. Staff law clerks' duties, supervision, and role also needed definition, and there was a large and important recruiting task, especially in recruiting the senior staff attorney. Circuit executives were involved in all of these "brush fires," and others peculiar to each circuit.

A Growing Role

It is our hope that the position can now develop considerably. More staff is available, and the imperative for a quick track record has passed. With some exceptions, we feel the circuit executives have not yet created the pivotal position they could. It seems no longer necessary for the circuit executive always to "keep a low profile," as several of them put it. Wherever possible, they need to assume the responsibility to relieve judges of detail work, but avoid doing detail work themselves when their work on policy-oriented matters is threatened. They should be at the heart of all matters of administrative policy for the court and council, staffing all committees, and <u>acting for</u> the judges on routine administrative matters. As

discussed in Chapters II and VI, many judges and councils need to develop a habit of delegation generally new to the judiciary, which has made little previous use of senior staff. In administrative matters, judges need to delegate authority to make decisions, not just request staff--normally law clerks--to gather information in support of their own decisions. Delegation of authority must be not only possible but routine if a position of this status is to be justified.

The circuit executives should be more widely used in other contexts as well. We see no reason a circuit executive should not serve as member of a committee of the Judicial Conference of the United States for which he has special expertise. It seems probable, for example, that executives who have worked extensively in personnel or budget matters could make important contributions as members of the corresponding committees. Also, we suggest that the Judicial Conference of the United State evaluate whether the circuit executives could make a useful contribution as staff at its regular meetings, assisting the two circuit representatives during Judicial Conference deliberations. Despite the logistical difficulties, we believe staff help could be

valuable to each Conference member, as they cope with the long agenda and massive supporting material that are now routine. Finally, the circuit executives could contribute more to the conferences and seminars of the Federal Judicial Center; they rarely or never appear on the programs of judge seminars or workshops, for example.

Several circuit executives expressed the view that they are at the "cutting edge" of a new task or discipline: the management of professionals. In this respect also they have little guidance; we have found little in the management literature that addresses the executives' problems. The notion does suggest that a circuit executive must be active and aggressive, and willing to make mistakes. We believe that many circuit executives have been too passive to be effective "change agents," a role that appears in the legislative history almost as an imperative. Obviously the task of managing professionals imposes limits, especially in the context of the judiciary. We believe that the circuit executives will justify the new position only if those limits are regularly tested.

APPENDIX A

Scope and Method

This report is based on two series of meetings with judges and support staff, as well as a review of such documents as judicial council minutes, correspondence of judges and supporting staff (especially circuit executives), and committee reports. The research was selective: our effort was to meet with those with particular interest or involvement in the work of circuit excutives and judicial councils, and to read the relevant documents that were brought to our attention. In keeping with our purpose, we met with more judges than support staff, and more appellate judges than trial judges. The conferences were open-ended and discursive, and varied in content depending on the work and interests of the person interviewed. Questions used are summarized at the end of this appendix.

The selective character of our research imposes evident limitations. It is possible that our understanding of the work of a particular circuit executive or judicial council is distorted by unrepresentative

views or experiences of certain individuals. We were aware of this possibility, however, and made a positive effort to forestall it by seeking diverse views. In particular, we used our initial interviews with circuit chief judges and circuit executives (held in December 1976 and January 1977) to identify people we should seek out in our second round of conferences later in 1977 and in early 1978. We used this method throughout our study.

The method of this study permits us to add a new perspective to what has been written by others who have evaluated court executive work. No one else has met with so many people who are familiar with executive activities, and the issues court executives deal with. On the other hand, our survey has limitations. This report deals in some fashion with almost every administrative question. Every administrative issue in every United States court is relevant to it. Our treatment of specific circuit executive initiatives is always selective and sometimes superficial. We did our best to put together an overview in a judicious fashion, but we may occasionally have been unfair.

The two authors, assisted by Professor David

Neubauer, met with the individuals listed below, and a number of their subordinates, in the course of preparing this report. Nearly all interviews were conducted by Professor McDermott and one other interviewer (Flanders or Neubauer). Nearly all the conferences were held in the chambers or offices of the persons mentioned; a few conferences were held elsewhere, usually in Washington. About five interviews were conducted by telephone only.

First Circuit

Chief Judge Frank M. Coffin

Judge Levin H. Campbell

Chief Judge Andrew A. Caffrey, District of Massachusetts

Chief Judge Edward Thaxter Gignoux, District of Maine

Dana H. Gallup, Circuit Clerk

Second Circuit

Chief Judge Irving R. Kaufman

Judge Wilfred Feinberg

Judge Walter R. Mansfield

Judge William H. Mulligan

Judge James L. Oakes

Judge William H. Timbers

Judge Murray I. Gurfein

Judge Ellsworth A. VanGraafeiland

Senior Circuit Judge J. Edward Lumbard

Chief Judge David N. Edelstein, Southern District of New York

Chief Judge Jacob Mishler, Eastern District of New York

Judge Charles L. Brieant, Jr., Southern District of New York

Former Judge Marvin E. Frankel, Southern District of New York

Judge Lawrence W. Pierce, Southern District of New York

Judge Milton Pollack, Southern District of New York

Judge Robert J. Ward, Southern District of New York

Judge Edward Weinfeld, Southern District of New York

Raymond F. Burghardt, Clerk, Southern District of New York

Nathaniel Fensterstock, Senior Staff Attorney

A. Daniel Fusaro, Circuit Clerk

Robert D. Lipscher, Circuit Executive

Lewis Orgel, former Clerk, Eastern District of New York

Third Circuit

Chief Judge Collins J. Seitz

Judge Ruggero J. Aldisert

Judge Arlin M. Adams

Judge John J. Gibbons

Judge Max Rosenn

Judge James Hunter III

Judge Joseph F. Weis, Jr.

Judge Leonard I. Garth

Senior Circuit Judge Albert Branson Maris

Senior Circuit Judge Francis L. Van Dusen

Chief Judge Joseph S. Lord III, Eastern District of Pennsylvania

Chief Judge Lawrence A. Whipple, District of New Jersey (now, Senior Judge)

Judge John P. Fullam, Eastern District of Pennsylvania

Judge Daniel H. Huyett 3rd, Eastern District of Pennsylvania

Judge Murray M. Schwartz, District of Delaware

Judge Herbert J. Stern, District of New Jersey

William A. (Pat) Doyle, Circuit Executive

John J. Harding, Clerk, Eastern District of Pennsylvania

Louise Jacobs, Senior Staff Attorney

Angelo W. Locascio, Clerk, District of New Jersey

Thomas F. Quinn, Circuit Clerk

Bernard Segal, Esq., Former President of the American Bar Association

Fourth Circuit

Chief Judge Clement F. Haynsworth, Jr.

Judge Harrison L. Winter

Judge John D. Butzner, Jr.

Judge Donald Russell

Senior Judge Albert V. Bryan

Chief Judge J. Robert Martin, Jr., District of South Carolina

Chief Judge Edward S. Northrop, District of Maryland

Judge Albert V. Bryan, Jr., Eastern District of Virginia

Senior Judge Walter E. Hoffman, Eastern District of Virginia

Samuel W. Phillips, Circuit Executive

Paul R. Schlitz, Clerk, District of Maryland

William K. Slate II, Circuit Clerk

Fifth Circuit

Chief Judge John R. Brown

Judge Homer Thornberry

Judges James P. Coleman

Judge Irving L. Goldberg

Judge Robert A. Ainsworth, Jr.

Judge John C. Godbold

Judge Lewis R. Morgan (now, Senior Judge)

Judge Charles Clark

Judge Paul H. Roney

Judge Thomas G. Gee

Judge Gerald B. Tjoflat

Judge James C. Hill

Senior Judge Elbert Parr Tuttle

Chief Judge C. Clyde Atkins, Southern District of Florida

Judge Edward J. Boyle, Sr., Eastern District of Louisiana

Judge Newell Edenfield, Northern District of Georgia

Judge Jack M. Gordon, Eastern District of Louisiana

Judge James Lawrence King, Southern District of Florida

Judge William C. O'Kelley, Northern District of Georgia

Judge Alvin B. Rubin, Eastern District of Louisiana (now, Fifth Circuit Court of Appeals)

Joseph I. Bogart, Clerk, Southern District of Florida

Ben H. Carter, Clerk, Northern District of Georgia

Lydia Comberrel, Deputy Clerk, Fifth Circuit (now, Staff Assistant to the Circuit Executive)

Maxwell Dodson, Librarian

Gilbert Ganucheau, Circuit Chief Deputy Clerk

Henry Hoppe III, Senior Staff Attorney

Thomas H. Reese, Circuit Executive

Edward S. Wadsworth, Circuit Clerk

Sixth Circuit

Chief Judge Harry Phillips

Judge George Clifton Edwards, Jr.

Judge Anthony J. Celebrezze

Judge John W. Peck (now, Senior Judge)

Judge Pierce Lively

Chief Judge Charles M. Allen, Western District of Kentucky

Chief Judge Frank. J. Battisti, Northern District of Ohio

Judge John Feikens, Eastern District of Michigan

Judge Timothy S. Hogan, Southern District of Ohio

Chief Judge Damon J. Keith, Eastern District of Michigan (now Judge, Sixth Circuit Court of Appeals)

Judge Cornelia G. Kennedy, Eastern District of Michigan (now, Chief Judge)

John P. Hehman, Circuit Clerk

James A. Higgins, Circuit Executive

Seventh Circuit

Chief Judge Thomas E. Fairchild

Judge Luther M. Swygert (former Chief Judge)

Judge Walter J. Cummings

Judge Wilbur F. Pell, Jr.

Judge Robert A. Sprecher

Judge William J. Bauer

Judge Harlington Wood, Jr.

Chief Judge James B. Parsons, Northern District of Illinois

Chief Judge William E. Steckler, Southern District of Indiana

H. Stuart Cunningham, Clerk, Northern District of Illinois

Collins T. Fitzpatrick, Circuit Executive

William A. Heede, Clerk, Southern District of Indiana

Thomas F. Strubbe, Circuit Clerk

Eighth Circuit

Chief Judge Floyd R. Gibson

Judge Donald P. Lay

Judge Gerald W. Heaney

Judge Donald R. Ross

Judge Roy L. Stephenson

Judge William H. Webster (now Director, FBI)

Chief Judge Edward J. Devitt, District of Minnesota

Chief Judge James H. Meredith, Eastern District of Missouri

Chief Judge John W. Oliver, Western District of Missouri

Judge Donald D. Alsop, District of Minnesota

Judge William H. Becker, Western District of Missouri (former Chief Judge, now Senior Judge)

Judge Robert V. Denney, District of Nebraska

Senior Judge Roy W. Harper, Eastern District of Missouri

Judge Earl R. Larson, District of Minnesota (now, Senior Judge)

Judge Miles W. Lord, District of Minnesota

Judge Albert G. Schatz, District of Nebraska

Robert F. Connor, Clerk, Western District of Missouri

R. Hanson Lawton, Circuit Executive

Robert Longstaff, Magistrate, Southern District of Iowa

Mary Jane Lyle, former Senior Staff Attorney

Robert J. Martineau, former Circuit Executive

William L. Olson, Clerk, District of Nebraska

Richard C. Peck, Magistrate, District of Nebraska

William D. Rund, Clerk, Eastern District of Missouri

Harry A. Sieben, Clerk, District of Minnesota

Ninth Circuit

Chief Judge James R. Browning

Judge Walter Ely

Judge Shirley M. Hufstedler

Judge Eugene A. Wright

Judge Ozell M. Trask

Judge Herbert Y. C. Choy

Judge Alfred T. Goodwin

Judge J. Clifford Wallace

Judge Joseph T. Sneed

Judge J. Blaine Anderson

Senior Circuit Judge Ben Cushing Duniway

Chief Judge Walter Early Craig, District of Arizona

Chief Judge Robert F. Peckham, Northern District of California

Chief Judge Albert Lee Stephens, Jr., Central District of California

Judge Stanley A. Weigel, Northern District of California

Wallace J. Furstenau, Clerk, District of Arizona

Greg Hughes, Acting Senior Staff Attorney

Edward M. Kritzman, Clerk, Central District of California

William B. Luck, Circuit Executive

William L. Whittaker, Clerk, Northern District of California

Tenth Circuit

Judge David T. Lewis (former Chief Judge, now Senior Judge)

Chief Judge Oliver Seth

Judge William J. Holloway, Jr.

Judge Robert H. McWilliams

Judge James E. Barrett

Judge William E. Doyle

Senior Judge Jean S. Breitenstein

Chief Judge Fred M. Winner, District of Colorado

Richard J. Banta, Senior Staff Attorney

Jesse Casaus, Clerk, District of New Mexico

Emory G. Hatcher, Circuit Executive

James R. Manspeaker, Clerk, District of Colorado

Howard K. Phillips, Circuit Clerk

District of Columbia Circuit

Judge David L. Bazelon (former Chief Judge)

Chief Judge J. Skelly Wright

Judge Carl McGowan

Judge Edward A. Tamm

Judge Spottswood W. Robinson III

Judge George E. MacKinnon

Judge Roger Robb

Judge Malcolm Richard Wilkey

Judge Gerhard A. Gesell, District Court

James F. Davey, Clerk, District Court

Charles E. Nelson, Circuit Executive

The following questions were discussed in these meetings. As already indicated, these were handled selectively; this is not an interview questionnaire but a list of topics raised with the appropriate persons in each circuit. Some of these topics have primary bearing on the judicial council aspect of the project.

Judicial Council Duties

Performance

Circuit Executive Role

A. Approve plans and direct appropriate modifications

Jury Selection Act

Criminal Justice Act

Speedy Trial Act

1. Has judicial council developed guidelines for plans or set policies?
2. Does circuit executive assist in development of plans?
3. Does circuit executive review plans prior to submission to judicial council? Can circuit executive return plan for corrections/changes/additions?

4. Does circuit executive make "work-up" of plans --summarizing key points and pointing out defects/problems? Does he make specific recommendations for modifications? What standards or criteria does circuit executive use in evaluating plans?
5. To whom is plan and circuit report (if any) submitted? Entire judicial council, chief judge, council committee, or resident or liaison judge?
6. What are standards for review? Only obvious conflicts with constitution or statute, or conflicts with circuit policies; independent judgment on merits of plan.
7. If intermediate review by other than full judicial council, what is extent of judicial council review? (Same as above or "rubber stamp"?)
8. Does judicial council circuit executive attempt to improve plans and/or achieve circuit uniformity?

B. Chief judge or judicial council approval of circuit judge visiting another circuit:

1. Chief judge or judicial council
2. Standards/criteria
3. Circuit executive? Collect data re backlog, other trips, etc.? Assignment of senior judge within circuit--by judicial council or chief judge (same as above)? Does judicial council or chief judge exercise judgment or "rubber stamp"?

C. Approve court quarters and accommodations. How does judicial council handle requests for new quarters - additions? Does circuit executive review requests or assist in preparation of requests?

D. Certify the physical/mental disability of judges--Are procedures established for:
   1. Requesting judicial council to consider?
   2. Obtaining information/evidence?
   3. Giving notice and hearing?
   4. Reassigning cases?

E. Does judicial council regularly designate the residence of district judges within circuit? Replacement judges? Additional judgeships? Does circuit executive collect data and make recommendations?

F. Approval of pretermission of district court ses-

sions. Does judicial council review and evaluate requests or just rubber stamp? Does circuit executive collect data and make recommendations?

G. Advise Judicial Conference of need for additional referees and magistrates.

1. Who initiates study, judicial council, individual districts, or circuit executive?
2. If originates within district court, who makes initial review--judicial council, judicial council committee, liaison or resident judge, chief judge, or circuit executive?
3. Are there circuit-wide standards for approving/authorizing additional personnel?
4. Who reviews initial judicial council review?
5. Circuit executive function: originating, data collection, review and evaluate, etc.

H. Public defenders.

How does judicial council determine if a public defender needed--independent evaluation and determination or wait for request from district court? If independent, who initiates, who conducts survey--resident circuit judge, circuit executive, judicial council committee?

Supporting data: Does circuit executive collect and evaluate? Has judicial council developed standards or guidelines for the establishment of a public defender's office and selection of the public defender? Circuit executive role?

I. Court reporters.

Council approval of requests for additional ones: Who reviews request from chief judge of district court? Who verifies need? Has judicial council authority been delegated to circuit executive? Are there judicial council standards or guidelines? Who follows up to see that A.O. is processing the request?

J. Approval of supporting personnel for senior judges: What criteria does the council use to determine if senior judge is still eligible for secretary and law clerks? Who approves? Standards? Rubber stamp? Circuit executive role?

K. Plans for limiting opinions: (Judicial Conference of the United States Reports 1972, 1973, 1975). Is there a circuit plan? Who developed the plan? How is it administered? To what extent is the circuit executive involved?

L. Approval of outside activities: (Judicial Conference of the United States - 1974). Are there circuit standards and guidelines? Is there an established procedure for seeking approval? Any intermediate review? By whom? Enforcement, investigation--role of circuit executive?

M. Resolve impasse in district courts: Are there rules for dividing busness between judges or is problem (if any) handled on an ad hoc basis? Are there standards and guidelines for the appointment and removal of referees and magistrates or are problems handled on an ad hoc basis?

N. GAO Report and Recommendation (5/10/77):

Better juror utilization

Interest on registry accounts

Better district court control/security over cash, exhibits, etc.

Close unused courthouses.

1. Are council judges aware of report and recommendations? Is chief judge aware of report and recommendations?

2. Has chief judge/judicial council acted? How/-what?

3. Has the circuit executive--either on own initiative or at direction of judicial council--made an investigation or study and report to judicial council?
4. If not, why not delegate this to circuit executive?
5. Can judicial council effectively handle problems of this type? For example, can or should the council promulgate model jury utilization plans for the district courts?

O. Should statute (28 USC § 332(d)) establishing judicial council be amended:

1. To provide for district court participation/representation?
2. To clearly define duties and responsibilities already granted to judicial council?
3. To expand or restrict duties of judicial council?
4. To provide for means of enforcement of judicial council orders?

P. Council meetings:

1. How often are they held? Who attends? How long do they last?

2. How much of meeting is devoted to court of appeals' business? How much to circuit business? Does council distinguish between the two?
3. Do district court judges participate or provide input for meetings? If so, how?

Q. Committee system: Are there judicial council committees? Composition (only circuit judges?) and responsibilities.

Circuit Executive Matters

A. Administrative assistance to chief judge:
1. Has chief judge delegated as many as possible non-judicial duties to circuit executive? What kinds of duties are non-delegable and why?
2. Is circuit executive performing routine or non-essential administrative duties which could be performed by other supporting personnel (chief judge's secretary, clerk of court of appeals, law clerk)?
3. Is circuit executive personally handling routine or non-essential administrative matters

which, without additional staff, cannot be delegated to others?

B. Secretary to judicial council:

1. Is circuit executive merely recording secretary or is he involved in preparing and planning for council meetings?
2. Does circuit executive gather information and data and make reports and recommendations to judicial council?
3. What support does circuit executive provide to judicial council committees?

C. Relationship to court of appeals:

1. To what degree, if any, is circuit executive responsible for the operation and staffing of:
   a. the clerk's office,
   b. the staff law clerks,
   c. the secretarial pool,
   d. library personnel?
2. Is circuit executive involved in "case manage ment" or "court management" for court of appeals? (Establish times and places for holding court sessions, determining which judges are to sit with which panels, determine need for vis-

iting judges, supervise any screening plans, etc.)?

3. Is circuit executive responsible for improved or innovative methods and plans for handling appeals? (Screening plans, CAMP, criminal appeal expediting plans, etc.)

D. Relations with the district courts:

1. Does circuit executive regularly visit district court judges and clerks?

2. What kinds of assistance has circuit executive provided to district courts?

E. Are courts better managed? Do judges have more time for "judging"?

(Try to get specific examples of changes brought by circuit executives which have actually made the courts more effective or efficient or relieved judges (not staff) of administrative duties.)

APPENDIX B

Survey of Circuit Executive Activities

This tabulation is based on a Federal Judicial Center mail survey that was a precursor to the present report. The results are discussed in a mimeo "Report on Survey of Circuit Executive Activities," dated August 12, 1976. The survey instrument was mailed October 21, 1975, and the tabulation reflects activity as of shortly after that date.

While the responses provide an excellent overview of the variety of circuit executive activities (and therefore were essential in designing the present project), it was necessary to go further because responses to a mail survey could not be informative concerning the frequency, relative importance or impact of the activities mentioned. The 1976 report contains further explanation and some important limitations on the data below.

Summary of Court Executive Activities

Activity	No. Engaged
ADMINISTRATION	
1. Implement directives of judicial council	8
2. Administrative support to judicial council	9
3. Plan conference of judicial council	8
4. Handle finances of judical council	7
5. Administrative support for circuit conference	8
6. Handle finances for circuit conference	8
7. Review judicial conference reports	9
8. Prepare report on judicial conference reports	7
9. Prepare annual report for circuit	4
10. Secretary to circuit committees	9
11. Secretary to joint circuit-district court committee	2
12. Staff support to circuit jury committee	8
13. Support for judges for speech and article preparation	7

ADMINISTRATION (Cont.)

14.	Support for judges in response to inquiries	8
15.	Approve calendar for court of appeals	1
16.	Propose panel assignments for court of appeals calendar	3
17.	Supervise staff attorneys for court of appeals	3
18.	Supervise court of appeals library	8
19.	Maintain custody of court of appeals library fund	4
20.	Process CJA vouchers for chief judge	5
21.	Approve CJA vouchers for chief judge	3
22.	Administer courthouse facility	8
23.	Arrange for ceremonials, unusual sessions, etc.	9
24.	Coordinate renovations and remodeling	9
25.	Handle court security program	8
26.	Develop automatic mailing lists	5
27.	Handle printing, publication and reproduction services	7
28.	Purchase supplies and equipment	9
29.	Administer secretarial pool	6

ADMINISTRATION (Cont.)

30.	Provide supplementary secretarial support to districts	3
31.	Monitor court report system and arrange for support where necessary	6
32.	Coordinate equipment needs with A.O.	9
33.	Install automatic typewriters	9
34.	Maintain records of space, equipment, supplies, facilities and personnel	7
35.	Index of slip opinions	5
36.	Prepare circuit directory	5
37.	Prepare bicentennial items for court	8

MANAGEMENT

1.	Troubleshooter for court problems	9
2.	Ombudsman for entire system	6
3.	Coordinator for "judge help" within circuit	6
4.	Coordinate judicial council responses to requests from other agencies and branches of government	9
5.	Member of circuit committees	7
6.	Confer with clerks, reporters, law clerks	9

MANAGEMENT (Cont.)

7.	Study organization units to assure proper function	8
8.	Develop measures of court performance	4
9.	Conduct caseflow improvement studies	5
10.	Reduce time for processing criminal appeals	5
11.	Prepare civil appeals management plan	1
12.	Develop work measurement studies	3
13.	Conduct work measurement studies	2
14.	Develop program to expedite transcript production	4
15.	Conduct paperwork management studies	5
16.	Review progress reports of district support offices	5
17.	Report to judicial counciil on problems and progress of district court support offices	8
18.	Survey procedures, systems and organization of district court clerks' offices	4
19.	Implement new ideas and procedures from other courts	9

MANAGEMENT (Cont.)

20.	Prepare new personnel policies and procedures	6
21.	Develop new position descriptions	9
22.	Develop consolidated personnel requests for courts	4
23.	Coordinate personnel needs with A.O.	9
24.	Personnel authority--"hire and fire"	6
25.	Prepare "desk book" on duties of individuals in clerks' offices	2
26.	Improve accounting procedures in clerks' offices	3
27.	Develop methods for quick, confidential case communication	4
28.	Develop staff attorney manual	1
29.	Develop law clerks' manual	1
30.	Coordinate plans for Speedy Trial Act	9
31.	Juror selection and utilization programs	5
32.	Creation of public defender offices	3
33.	Coordinate new public defender offices	5
34.	Assist public defenders in office management	3
35.	Coordinate budget with A.O.	6

COMMUNICATION

1.	Prepare meetings of district judges with chief circuit judge	6
2.	Prepare conferences of district court clerks, reporters and law clerks	6
3.	Issue bulletins, manuals, etc., for communication with employees of court	7
4.	Develop circuit-wide newsletter	2
5.	Communicate new ideas and procedures from other courts to appropriate individuals	9

DATA DEVELOPMENT

1.	Prepare data for court of appeals calendar	4
2.	Computerize court of appeals case information	3
3.	Prepare statistical reports for hearings for chief judge	9
4.	Prepare circuit status reports for judical council	7
5.	Develop new reports for district courts	6
6.	Develop statistics for quadriennial survey of judgeship needs	8

PLANNING (Cont.)

7.	Coordinate flow of reports between national and circuit levels, e.g., 3-year civil cases	7

TRAINING

1.	Law clerks' orientation program	7
2.	Training for upgrading personnel	6
3.	Seminar for appellate attorneys	2
4.	Prepare attorney handbook for practice before court of appeals	7
5.	Plan, develop and implement intra-circuit training programs for emplyees	5
6.	Lecture at seminars for Federal Judicial Center	4

PLANNING

1.	Policy studies for judicial council	9
2.	New rules of court	9
3.	One-year and five-year court plans	6
4.	Forecases for court of appeals calendar	4
5.	Caseload forecasting	5
6.	Defining needs of judicial council	6
7.	Criminal Justice Act planning	8
8.	Communication and research systems	6

PLANNING (Cont.)

9.	New court facilities	7
10.	Space utilization	7
11.	Staff attorney concept	6
12.	Magistrate positions	8
13.	Bankruptcy positions	5
14.	Improved budgeting	6
15.	Improved slip opinion printing	9
16.	Projection of needs for space, equipment, supplies, facilities, personnel	9
17.	Court of appeals computer system (with FJC)	6
18.	Computerized transcription	1
19.	Computerized legal research (with FJC)	4
20.	Video tape depositions (with FJC)	2
21.	Assist FJC with planning, developing and evaluating new projects	8

LIAISON CONTACTS

1.	Public generally	9
2.	School groups (tours)	7
3.	Bar members and bar associations	8
4.	Bar-law school groups	3
5.	Press	9

LIAISON CONTACTS (Cont.)

6.	Congress	9
7.	General Accounting Office	5
8.	Executive Branch generally	9
9.	General Services Administration	9
10.	Justice Department	8
11.	U.S. Attorneys	8
12.	U.S. Marshal's office	9
13.	Federal Protection Service	8
14.	Post Office	7
15.	State and local courts	9
16.	State and local agencies	7
17.	District Judges' Associations	3
18.	Administration Office of United States Courts	9
19.	Federal Judicial Center	9

APPENDIX C

Supplemental Legislative History and Sources

In February 1963, the Council of the Section on Judicial Administration of the American Bar Association became deeply concerned with delays in United States Courts of Appeals. Despite the addition of a large number of circuit judges in 1961,[179] the ever-increasing number of appeals were creating larger backlogs and longer delays. The Council passed a resolution presented by Mr. Bernard Segal calling for a nationwide study of the congestion in the United States Courts of Appeals.[180] In May 1964, the ABA Board of Governors adopted the resolution, and the American Bar Foundation subsequently agreed to sponsor and fund the project. Professor Paul D. Carrington, then of the University of Michigan, was retained as project director and Mr. Segal became chairman of the project's advisory committee, which was composed of members of both bench and bar.

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179. Act of May 19, 1961, Publ. L. No. 87-36.

180. Hearings before Subcommittee No. 5 of the House Committee on the Judiciary, 91st Cong., 2d Sess. 35 (July 8, 1970).

The committee determined that conditions in the United States courts of appeals would not substantially improve unless greatly improved administrative facilities were provided. "Expert managerial aid" for the clerks of the courts of appeals was considered especially important. The committee specifically recommended that "[e]ach court should have an Administrative Officer, responsbile to the Circuit Council and having authority and responsibility for the Court's business. He should assume, so far as possible, all the nonjudicial duties of the Circuit Judges."[181] The recommendation drew upon the work of Will Shafroth of the Administrative Office of the U.S. Courts, who later made a similar finding after a nationwide survey of the courts of appeals.[182]

Some of those experienced in the management of state courts have attempted to construct a parallel between the circuit executive and state court administrators.[183] Thus it may be instructive to compare the re-

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181. Id. at 36; also, Senate Hearings at 284.

182. 42 F.R.D. 289 (1968).

183. In Oglesby and Gallas, "Court Administration--A New Profession: A Role for Universities," 10 Am. Bus.

sponsibilities of the circuit executive with those suggested for the court administrators. The "Model Act to Provide for an Administrator for the State Courts" suggests the following duties for the administrative director:

L.J. 1 (1972), the principal responsibilities and duties of court executives were described as organizing and evaluating maintenance of practices and procedures, record keeping and data compiling, obtaining and monitoring the allocation of resources, managing personnel systems and the designing, implementing and operating of management systems.

Bernadine Meyer in "Court Aministration--the Newest Profession," 10 Duq. L. Rev. 220 (1971), identified various responsibilities carried out by state court executives, emphasizing that management of nonjudicial court activities varies from district to district. In Pennsylvania the court executive serves as pretrial master and is responsible for purchasing, compiling statistics, preparing reports and releasing information to the news media. In New Jersey, the court executive serves as secretary to the judicial council and answers complaints with regard to courts. In California the court administrators are responsible for calendar management and jury and witness service. As early as 1954, the following duties were being handled by court administrators in the state systems: conducting surveys of the judicial system, compiling statistical data, making reports of business transactions by the courts, supervising the administrative methods of clerks' offices and regularly examining court dockets to determine the need for assistance and to facilitate the assignment and transfer of judges.

Another useful statement appears in D. Saari, Modern Court Management: Trends in the Role of the Court Executive (National Institute of Law Enforcement and Criminal Justice 1970) at 17-19.

1. Formulate and submit to the court recommendations for the improvement of the judicial system.

2. Examine the administrative and business methods and systems in the offices of the clerks of the court and other offices related to and serving the courts and make recommendations for necessary improvement.

3. Collect and compile statistical data and other information on the judicial work of the court and on the work of other offices related to and serving the courts and publish periodic reports with respect thereto.

4. Examine the state of the dockets and practices and prccedures of the court and make recommendations for the expedition of litigation.

5. Prepare and submit budget estimates and appropriations necessary for the maintenance and operation of the judicial branch.

6. File requests for permission to spend funds appropriated for the judicial branch and approve all vouchers for the expenditure of such funds.

7. Secure and maintain accommodations and purchase, exchange and distribute equipment and supplies

for the judges, clerks, other offices, officers, and employees of the courts supported by state appropriations.

8. Collect and compile statistical data and other information on the expenditures and receipts of the courts and related offices and publish periodical reports.

9. Consult with and assist the clerks of the court and other officers and employees of the court and of the offices related to and serving the courts.

10. Investigate complaints with respect to the operation of the courts and make such recommendations as may be appropriate.

11. Act as the secretary of the judicial council and for the committees thereof.

12. Perform such additional duties as may be assigned by rule of the court.

13. Prepare and publish an annual report of the work of the court and the activities of the administrative office of the courts.[184]

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184. "Court Administrators: Their Function, Qualifications and Salaries." American Judicature Society Report No. 17 (1971), at 46. A copy of the Model Act was submitted to the House Committee on the Judiciary by

Although there are differences that make it impossible or impractical for the circuit executive to attempt to handle all of the above duties[185] many are similar to those contained in the Act and others seem appropriate for the circuit executive.

Although the Circuit Executive Act does not mandate the duties and responsibilities of the circuit executive, there were those who strongly urged that the duties and responsibilities of the circuit executive be clearly and unequivocally defined. Newell H. Ellison, chairman of the District of Columbia Committee on the Administration of Justice did so on behalf of his committee. Because the committee felt that the position was vitally important to the improved operation of the court system, it urged that the duties of the court executive should not be left to the individual courts throughout the country.[186] Therefore, the committee

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John W. Dean III, Associate Deputy Attorney General, and is reprinted in "July Hearings" at 45. The listing here has been slightly edited by the authors.

185. For example, the Administrative Office of the United States Courts handles fiscal matters for the federal courts.

186. November Hearings at 427.

suggested the following duties for the circuit executive, subject to the approval of the chief judge of the circuit:

1. Organize and administer efficiently and economically all of the nonjudicial activities of the court.

2. Assign, supervise and direct the work of the nonjudicial officers and employees of the court.

3. Appoint and remove all nonjudicial personnel except the personal staff of the judges.

4. Formulate and administer a system of personnel administration including an in-service training program for nonjudicial personnel.

5. Administer the court's budget, fiscal, accounting, procurement and space functions.

6. Conduct studies of the business of the court and prepare appropriate recommendations and reports relating to the business and administration of the court.

7. Define management information requirements and collect, compile and analyze statistical data with a view to evaluation of the performance of the court and preparation and presentation of reports.

8. Establish procedures for the management of the jury selection system.

9. Attend meetings of the judges of the court and serve as secretary in such meetings.

10. Except to the extent that this function is performed by the chief judge, maintain liaison with governmental and other public and private groups having an interest in the administration of the courts.

11. Prepare and submit to the court periodically, at least annually, a report of the activities and the state of business of the court which the chief judge shall publish. This report shall include meaningful and current data in a standard format on the ages and types of pending cases, method of disposition of cases, information on current operating problems and measures to indicate standards of performance. . . . The report shall include a description of innovations and modifications introduced to improve the court.

12. Perform such other duties as may be assigned to him by the chief judge and as may be necessary for the proper administration of the court.

In response to a question from Chairman Celler, Mr. Ellison expressed his concern that the creation of

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Proponents of the Circuit Executive Act hoped that the new position would lead to comprehensive improvement in federal court management. In addition to helping the circuit chief judge with existing administrative tasks, the circuit executives were expected to fundamentally improve management and operation of the court of appeals (and also the district courts). They were expected also to extend the scope and improve the operation of the judicial councils.

However, there was little specific discussion of precise tasks. No professional staff was provided, and the courts themselves did little to define the scope of the job. Most executives were left to develop their positions ad hoc.

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Though the executives have helped chief judges, many chief judges still spend too much time on administration. They should delegate more administrative authority to the circuit executives, who would be responsible for all matters of "organizational maintenance." Many executives spend too much time on routine matters also.

III. THE CIRCUIT EXECUTIVE AND MANAGEMENT OF THE COURT OF APPEALS 73 1/G8

Although there was obvious potential for conflict, little was done to define in advance the jobs of circuit executive and circuit clerk. The relationship has been unsatisfactory in several instances. Of three ways the positions have been defined and distinguished, the most satisfactory has been a role for the circuit executive as staff to court and council. This leaves full responsibility to the clerk to manage his office, but provides an important episodic role to the circuit executive when problems or new issues arise.

IV. THE JUDICIAL PROCESS IN THE COURT OF APPEALS 110 2/C7

Some circuit executives have instituted major improvements in the judicial process, but the record has been spotty. Some courts have limited the executives' role in "judicial business," and some executives have not taken vigorous or effective initiatives in improving the judicial process. Often the executives' time was preempted by work as administrative assistant. The scope and importance of the circuit executives' successes indicate they can accomplish a great deal.

V. ASSISTANCE TO THE DISTRICT COURTS 152 2/F7

Only a few circuit executives have had a major impact in district courts. Most have been limited by competing priorities, by their identification with the court of appeals and council, and other factors. The instances of circuit executive success in district court matters indicate a large potential role here.

VI. STAFF TO THE JUDICIAL COUNCIL AND JUDICIAL CONFERENCE 188 3/B5

Circuit executives have been useful and effective in staffing the Councils and Conferences. They have not brought a dramatic expansion of council activity, as some proponents of the Act hoped (probably this was unrealistic).

Staff work to Councils and Conferences could still bear improvement. The councils should delegate authority to make decisions on minor administrative matters. The circuit executive should present data to the council in a more manageable form.

VII. TRANSITION AND GROWTH 217 3/D6

Some concluding observations about a changing role:

- The skills of a knowledgeable insider in the courts have proved important, as have legal skills. High-level managerial experience has been less important.

- Circuit executives have had to focus excessively on minutiae thus far, partly in order to establish a "track record."

- Now that the position is well established, circuit executives should be able to grow further into the more potent aspects of the job, helping to improve the judicial process in all courts in their circuits and strengthening the judicial councils. Also, it is to be hoped that they can have a larger and more direct role in the work of the Judicial Conference of the United States and the Federal Judicial Center.

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the position of circuit executive without specific assigned duties could lead to "nothing more than a glorified chief clerk under a new name." However, it appears that Mr. Ellison and others had particularly in mind the duties of a district court executive rather than a circuit executive.

Mr. Theodore Voorhees, chairman of the American Bar Association Section on Judicial Administration, pointed out "the need for an Administrator who will go and tell the judges themselves, 'This is where you are needed. This is the job that you ought to be performing at this particular day and hour.' A clerk simply cannot do that . . . . The judges will not not take that from a court clerk, whereas because of the nature of the executive's function, he can present the judges with their assignments for the day and they must accept it. Once you have that type of administration, your court begins to pick up tremendously in its efficiency."[187]

These remarks seems primarily directed to trial court matters. However, they are of interest here

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187. November Hearings at 425.

because they show that Mr. Voorhees, like others, had in mind a court executive who would bring an entirely new perspective, with new authority.

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